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No. _____

The Supreme Court of the United States

OCTOBER TERM, 1993

JEROME BERG,

Petitioner

VS.

THE DOCTORS' INSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did retroactive application of California Civil Code Section 2860 by the California state courts unconstitutionally alter obligations of contract in violation of the Contracts Clause of the United States Constitution Article I, Section 10 by ending the insurance company's duty to provide independent counsel midway through litigation in which the insureds were represented by conflicted insurance company selected attorneys?

2. Was Petitioner denied due process of the law under the Fourteenth Amendment to the United States Constitution because the lower courts refused to allow introduction of Petitioner's relevant evidence: (a) demonstrating conflicts of interest by the insurance company's selected attorneys, and (b) demonstrating work Petitioner

accomplished as counsel for the insureds where the court of appeal faulted Petitioner for not introducing adequate proof that the insurance company selected attorneys were in conflict with the insureds they were defending.

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Dorsch, *Insurance Defense Costs and the Legal Defense Cost Containment Program: Is the Free Ride Over?,* 53 Ins. Couns. J. 580 (1986) 28

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OPINIONS BELOW

The opinion of the California Court of Appeal has not been published in official reports. A copy of this unpublished opinion is set out hereinafter as Exhibit 1 in Appendix B. The Judgment on Verdict from the California Superior Court, County of San Francisco is attached as Exhibit 2 in Appendix B. The Order Granting Summary Adjudication of Issues is attached as Exhibit 3 in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal was entered on July 30,1993. A timely Petition for Rehearing in the California Court of Appeal was denied on August 23, 1993. (Exhibit 4 in Appendix B) A timely petition for hearing before the California Supreme Court was denied on November 23, 1993. (Exhibit 5 in Appendix B) The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Contracts Clause, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, printed as Exhibit 1 in Appendix A. The statutory provision involved is California Civil Code § 2860, printed as Exhibit 2 in Appendix A.

STATEMENT OF THE CASE

Prior to enactment of Civil Code § 2860 petitioner had been "independent counsel" of record in over 40 active malpractice lawsuits representing dentists insured by The Dentists Insurance Company (TDIC) due to conflicts of interests of TDIC and

their usual (panel) counsel[1] who regularly defend TDIC insureds. TDIC acknowledged petitioner's representation in writing and paid his fees for well over one year.

In September, 1987, the California Legislature passed Civil Code § 2860, which became effective on January 1, 1988. Section 2860 partially codified and partially modified the decision in *San Diego Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358, 364 [208 Cal.Rptr. 494].[2] The pertinent parts of §2860 declare that:

> when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy

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1 Bradley and Curley, hereinafter "B&C."

2 Hereinafter *Cumis*.

limits.[3]

TDIC viewed enactment of Civil Code § 2860 as an excuse to stop paying for independent counsel. Ignoring the myriad conflicts, TDIC took the position that the only reason it had supplied *Cumis* counsel was that the complaints included claims for punitive damages. Since § 2860 states that claims for punitive damages do not, in and of themselves, trigger *Cumis* obligations, TDIC argued it no longer had to pay Berg. In January and February, 1988, TDIC notified Petitioner, Dr. P, Dr. W and Dr. M (the insureds) that it would no longer pay for Berg's services in those ongoing lawsuits against these dentists.

When Petitioner learned of Respondent's decision, he immediately wrote Respondent and pointed out the error in its position (C.T. 834 to 837)[4]. Respondent persisted.

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[3] California Civil Code Section 2860(b), West's Annotated California Codes, 1993.

[4] C.T. refers to the Clerk's Transcript.

Petitioner's clients' backs were against the wall. Although Respondent stopped paying for Petitioner's services, and he did not get paid by anyone else, Petitioner continued to represent Dr. W, Dr. P and Dr. M. in those lawsuits pursuant to his ethical obligations. In the cases of Dr. P and Dr. W he continued to work for two and one half years until all the malpractice cases against them were resolved. (C.T. 701 to 711)

Respondent was aware that Petitioner had not stopped working on those lawsuits. In fact, after refusing to pay Petitioner for work he was doing after the start of 1988, Respondent cynically advised the dentists to consult with Petitioner when questions involving conflicts arose. (C.T. 849, 871 to 873, 874, 878, 884, 1068, 1074, 1078-1079, 1101 to 1102) In the case of Dr. W, after the 1988 cutoff,

Petitioner negotiated a binding arbitration of claims for "re-treatment" of most of his patients which were made by the dentists who purchased Dr. W's practice. These were malpractice claims payable under Dr. W's TDIC policy. Respondent was a party to that agreement, and Respondent paid the arbitrator. (C.T. 841, 850 to 852, 853 to 856)

A. Summary Adjudication

Early in this case, a motion for summary adjudication of issues was granted at C.T. 323, lines 9 to 22:

> TDIC had no obligation following enactment of Civil Code Section 2860 to pay Jerome Berg's statements for services allegedly performed and costs allegedly incurred as independent counsel for TDIC's insureds (Dr. P., Dr. W., and Dr. M.) in cases *where TDIC reserved its rights solely* because of allegations of punitive damages. (Emph. added.)

Copies of the complaints against Petitioner's clients (including demurrer-tested pleadings charging "intentional

acts") that had been produced on discovery out of Respondent's files (C.T. 485:21-486:2) were presented on a motion for reconsideration (that was not successful).

The trial judge erroneously applied the summary adjudication ruling:

> THE COURT: We know that the law changed January 1st of '88. Leaving them no longer responsible for this.
>
> Why are we pursuing it? You know it and because I know it, because we have a ruling on it.[5] (R.T. 288:8-15, 16-20)[6]

B. No Insurance Coverage for Willful Torts

All of the 40 lawsuits were dangerous to Petitioner's clients who were charged with intentional acts which are excluded from insurance coverage by Insurance Code §§ 253 and 533.[7] The charges are

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5 The trial court is referring to the ruling on summary adjudication.

6 R.T. refers to the Trial Court Reporter's Transcript.

7 Insurance Code § 253 embracing Code of

extensive:

1. The Cases against Dr. W (Unlicensed Dentistry)

Dr. W was a defendant in 20 lawsuits filed in 1985 and 1986. Eighteen of these were filed by Attorney Steven Cavalli. The suits charged Dr. W with permitting unlicensed employees to practice dentistry. (*See* C.T. 503 Berg's testimony at R.T. 884 and attorney Goldman's testimony at R.T. 809.) In some cases Dr. W was also charged with doctoring charts to conceal his tortious acts. (C.T. 503, 735, 757, 811, 820, 823, 830, 871)

Civil Procedure § 1029.8 forbids insurance coverage for health care services rendered by unlicensed people.

Insurance Code § 533 provides that the insurer is not liable for a loss caused by the willful act of the insured.

2. The Cases Against Dr. P (A "meat factory...assembly line")

Dr. P was sued in twenty-two lawsuits. (C.T. 1054). Attorney David Rosenberg represented the plaintiffs in nineteen of the cases. (R.T. 457:13-22). Rosenberg's standard complaint was in evidence at the Motion for Reconsideration of the Summary Adjudication. (C.T. 511) Rosenberg's clients charged Dr. P with running a "meat factory" to maximize his profits. (C.T. 1044). They accused Dr. P of deliberately doing hasty, slipshod dental work with knowledge that a certain percentage would have to be redone. According to the "meat factory" theory, Dr. P had consulted experts who calculated that it was more profitable to redo the work in those cases where he got caught than to slow down the "assembly line," and do the work properly in the first instance. He was also charged

with destroying x-rays, altering charts and doing dental work while intoxicated. (*See* C.T. 511, which supports the Motion for Reconsideration of the Summary Adjudication and C.T. 914, 915, 939, 941, 971, 1013, 1044, 1046, 1063, 1069, 1070, 1072, 1076, 1079, and 1093 - 1098, which support the motion for new trial.) Demurrers to the intentional conduct allegations in "all sixteen" of Rosenberg's then outstanding cases were overruled, and TDIC was so informed by B&C March 4, 1987 (C.T. 954).

3. The Cases Against Dr. M (Unlicensed Surgery)

Dr. M was a defendant in two suits. In Carlile v. M. served in September 1986, (C.T. 1123) he is a dentist who was charged with performing surgery on a patient's body far from the mouth without a physician's license.[8] (*See* Berg's

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8 Another Insurance Code § 253 problem.

testimony at R.T. 1039:21-27; R.T. 1042:27 to 1043:1; C.T. 1123 and 1143), and Mr. Curley's similar testimony at R.T. 489:18-22) In the other case (Oliva v. M) he was charged with fraudulently representing himself as an M.D. in order to obtain her consent for his work on her which resulted in injury. (C.T. 1119-23, 1132)

C. The Original Lawyers Were in Conflict

Over the years, B&C received a great volume of defense cases by assignment from TDIC. (R.T. 437 lines 25 to 28, R.T. 460 lines 21 to 27 and R.T. 461 line 27 to R.T. 462 line 6). B&C began the defenses of Drs. W, P and M. Respondent became "independent counsel" when B&C realized that conflicts of interest plagued their relationship with Drs. W, P and M. (*See* C.T. 716 through 719, 770, 771, 982, 983 and 1134.) As synopsized above it is

obvious that the forty or more lawsuits against these TDIC insureds were all of a type in which the defense lawyers could "tip" the facts to produce outcomes of intentional tort for which TDIC would be forbidden to pay indemnity under public policies expressed in Insurance Code §§ 253 and 533.[9]

Discovery of B&C's secret reports to TDIC revealed that B&C were supplying TDIC heavy evidence of willful torts by the TDIC insureds--items that "coverage counsel" Bronson, Bronson & McKinnon had been consulted about (C.T. 762). These secret reports were cited to the Court of Appeal (which down-played the reports because they were not "direct evidence," Opinion page 9).

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9 *See Supra* note 7.

D. Federal Questions Raised in State Courts

1. §2860 and the Contracts Clause

Petitioner in his Memorandum of Points and Authorities in Support of His Motion For New Trial, or In the Alternative, For Judgement N.O.V. (C.T. 1183; *See* Exhibit 1, Appendix C) raised a constitutional question regarding the Contracts Clause of the United States Constitution and its applicability to California Civil Code Section 2860 as applied in this case.

Petitioner raised the Contract Clause issue in his Opening Brief to the California Court of Appeal, First Appellate District, Division Five at p. 17 (*See* Exhibit 2, Appendix C).

Petitioner also raised the Contract Clause issue in his Petition to the California Court of Appeal for Rehearing at p. 16 (*See* Exhibit 3, Appendix C).

Finally, Petitioner, in his Memorandum of Points and Authorities in Opposition to TDIC's Motion for Summary Adjudication of Issues raises the issues of retroactive application of §2860 and breach of contract contrary to the Contracts Clause. (C.T. 187; *See* Exhibit 4, Appendix C)

2. Due Process Fairness Issues

Petitioner in his Memorandum of Points and Authorities in Support of His Motion For New Trial, or In the Alternative, For Judgement N.O.V. raised fairness concerns regarding evidence deemed inadmissible for trial purposes. (C.T. 1169, 1190; Exhibit 1, Appendix C)

Petitioner also raised the fairness/due process issue in his Opening Brief to the California Court of Appeal, First Appellate District, Division Five at p. 26 (Exhibit 2, Appendix C), and in his Petition to the California Supreme Court

at pages 8-13 (*See* Exhibit 5, Appendix C).

Finally, Petitioner raised the fairness/due process issue in his Petition to the California Court of Appeal for a Rehearing at p. 17 (*See* Exhibit 3, Appendix C)

ARGUMENTS FOR GRANTING CERTIORARI

1. Retroactive application of California Civil Code § 2860 by the California state trial and appellate courts unconstitutionally altered obligations of contract in violation of the Contracts Clause of the United States Constitution Article I, Section 10 and forced attorneys to work in conflict situations.

Article I, Section 10, Clause 1 of the United States Constitution provides that "[no] State shall ... pass any ... Law

impairing the Obligation of Contracts...." In a series of opinions the Court has delineated the reach of the Clause and set forth a three-part inquiry to guide in its interpretation. Parties seeking relief must demonstrate: (1) that there has been a substantial impairment of a contractual relationship; (2) that the impairment is not justified by a "significant and legitimate public purpose," or if so justified, then (3) that the impairment is not based upon reasonable conditions or of a character appropriate to the public purpose justifying the legislation's adoption. *United States Trust Co. v New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 1518 (1977); *Ross v. City of Berkeley,* 655 F.Supp. 820, 827 (N.D.Cal. 1987).

For over a year before enactment of Section 2860, TDIC had been providing representation through independent legal

counsel of record to TDIC insureds involved in tort litigation which charged intentional acts serious enough to be outside their coverage. Petitioner was independent counsel of record in 40 separate law suits. Contract rights between the parties involved had matured prior to enactment of Section 2860. Valid contracts existed under which TDIC owed the insureds a duty to defend those suits. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984).

Petitioner had a contract with TDIC, whereby TDIC would pay Petitioner as "independent counsel" for defending TDIC's insureds in that litigation. Petitioner also had a contract with TDIC's insureds whom Petitioner represented as legal counsel of record -- this relationship also included ethical duties and

obligations which Petitioner owed to his clients including their expectations of a continuity in his representation as counsel of record.[10]

Once a contract is found, it must be determined whether the legislative act impaired the contractual relationships involved. The obligations of a contract are impaired by a law which renders them invalid, releases, or extinguishes them. *City of Torrence v. Workers' Comp. App. Bd.* 32 Cal.3d 371, 377,185 Cal.Rptr. 645, 648 (1992). In this case, Section 2860, as interpreted and retroactively applied, has relieved TDIC of the obligation to fund Petitioner as independent counsel.[11] This

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10 California Rules of Professional Conduct Rule 3-700(C).

11 In enacting Section 2860, the legislature did not expressly state whether the statute should be applied only prospectively or whether it would be given retroactive effect for claims and policies in existence before January 1, 1988, the effective date of the statute. In the only reported decision raising the issue, the court refused to apply the statute retroactively

application of Section 2860 has impaired the contractual obligations and expectations of the insureds who faced loss of indemnification if the TDIC lawyers provided to them, by taking advantage of the conflict, tipped the cases to favor TDIC.

If impairment is found, it must be determined whether the impairing law

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because of the absence of evidence as the legislature's intent. *Center Found. v. Chicago Ins. Co.*, 227 Cal.App.3d 547, 278 Cal.Rptr. 13 (1991). This decision is consistent with existing law which suggests that a statute that changes, rather than clarifies, the law is presumed to operate prospectively, absent a clear legislative expression that retroactive application was intended. *Williams v. State Farm & Cas. Co.*, 216 Cal.App.3d 1540,1548, 265 Cal.Rptr. 644, 648 (1989). Further, because an insurance policy is governed by the statutory and decisional law in force at the time the policy is issued, that law becomes part of the contract and binds the contracting parties. *Interinsurance Exchange v. Ohio Cas. Ins. Col.*, 58 Cal.2d 142, 23 Cal.Rptr. 592 (1962); *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.2d 142, 26,130 Cal.Rptr. 446 (1976). Although the legislature has the power to change procedural rules, it may not destroy vested rights or impair contractual obligations. *Norton v. City of Pomona* 5 Cal.2d 54, 53 P2d 952 (1935); *Department of Health Services v. Fontes*, 169 Cal.App.3d 301, 215 Cal.Rptr. 14 (1985); CEB California Liability Insurance Practice: Claims and Litigation, June 1993 Update.

exceeds the bounds of the constitutional limitations *Walsh v Board of Admin.of PERS* 4 Cal.App.4th 687, 6 Cal.Rptr.2d 118,127 (1992).

Retroactive application of Calif. Civil Code Section 2860 substantially impaired the contractual relationship between the parties involved: TDIC, Petitioner, and his clients (the insureds). Enactment of Section 2860 did not merely restrict the contracting parties to "gains [they] reasonably expected from the contract," *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704 (1983), but eviscerated independent counsel coverage completely and in effect changed the attorneys' rules of professional conduct.[12] The basis of the bargain for a liability insurance contract is that in return for the

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12 Model Code of Prof. Resp. DR 5-105

insured's promise to pay premiums, the insurer promises to provide a defense to actions against the insured and to indemnify the insured for all payments the insured is legally obligated to make for an occurrence within the policy's provisions. When there are divergent interests of the insured and the insurer brought about by the insurer's possible non-coverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y,* 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984). Indeed, the insurance company's duty to defend is independent of its duty to indemnify, *Gray v Zurich Insurance Co.*, 65 Cal.2d 263, 51 Cal.Rptr. 104 (1966), and both these duties are contractual obligations the insurance company undertakes by accepting

the insureds' premiums.

Section 2860, as applied by the Court of Appeal, First Appellate District, Division 5, wipes out a key element of the insurance company's duty to defend by attempting to unconstitutionally eliminate the insureds' right to be represented by an attorney who is not in a conflict of interest against the insured.[13] The last sentence in Section 2860(b) states: "No conflict of interest shall be deemed to exist as to allegations of punitive damages...." This statement is much too broad -- punitive damages allegations may give rise to numerous conflicts at every stage of litigation because the only basis for punitive damages is conduct so willful it is outside the coverage for accidental activities.[14]

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[13] This right was established by *Cumis* and thereafter incorporated into all insurance contracts. *See Supra* nt. 10

[14] Here, demurrer-tested complaints charged

The legislature cannot amend the rules of professional conduct relating to conflicts of interest. *Brotsky v. State Bar*, 57 Cal.2d 287,19 Cal.Rptr. 153, 368 P.2d 697 (1962); *Ramirez v. State Bar*, 28 Cal.3d 402,169 Cal.Rptr. 206, 281 P.2d 1020 (1980). Strict definitions have no place in ethical determinations. One must look at the facts, circumstances, and procedural background of the particular case to determine whether a conflict of interest exists. Ethical problems such as conflicts of interest are rarely black or white. Instead, they require a delicate balancing of all the risks and possible harms, a job well suited to the judiciary. To the extent that the statute, as

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Petitioner's clients (insureds) with employing unlicensed helpers to render dental care, a dentist doing surgery on a patient's hip, and a dentist running a "meat factory" of high speed dentistry recommended by an efficiency expert who demonstrated that it was cost-effective to fix the inevitable botched work at a later time than take the time to perform the work correctly in the first place.

applied, seeks to eliminate by legislative fiat the only remedy to forcing an insured to be represented by conflicted attorneys, the statute must be void. The judiciary through its inherent power to control its proceedings and officers of the court has control over the rules for attorney conduct and ethics. Although the State Legislature and the State Bar have roles in the determination of appropriate professional conduct of attorneys, the ultimate arbiter is the judiciary.[15] Thus, to the extent that the Legislature

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15 State Bar Act, California Business & Professions Code Sections 6000-6228.

Admission to practice law is conceded to be the exercise of a judicial function. It is one of the inherent powers of the court. *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929). Although the court has recognized the Legislature's right to impose certain restrictions upon the practice of law, *Cohen v. Wright*, 22 Cal. 293 (1863), the disciplining of attorneys has been left to the judiciary, *Brotsky v. State Bar*, 57 Cal.2d 287,19 Cal.Rptr. 153, 368 P.2d 697 (1962), and the judiciary retains the power to regulate the conduct of members of the bar. *Ramirez v. State Bar*, 28 Cal.3d 402,169 Cal.Rptr. 206, 281 P.2d 1020 (1980).

is attempting to prevent the courts from determining what constitutes a conflict of interest, the Legislature is materially interfering with the court's power to control the proceedings before it. To that extent, Section 2860(b) is unconstitutional because it usurps the power of the judiciary and violates the separation of powers delineated in the Constitution of the State of California, Article VI, Section 1.[16] As a result, retroactive application of Calif. Civil Code Section 2860 substantially impaired the contractual relationship between the parties involved and must be justified by a significant and legitimate public purpose.

The substantial impairment caused by

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16 Constitution of California, Article VI, Section 1: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All courts are courts of record."

retroactive application of Calif. Civil Code Section 2860 is not justified by a "significant and legitimate public purpose ... such as the remedying of a broad and general social or economic problem." *Energy Reserves Group* at 411-12, 704-05. "[T]he severity of the impairment measures the height of the hurdle the state legislation must clear .... Severe impairment ... will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co. v Spannaus,* 438 U.S. 234, 245, 98 S.Ct. 2716, 2723 (1978).

In determining the legitimacy of a public purpose, the court must assure that "the State is exercising its police power, rather than benefiting special interests." *Energy Reserves Group,* 459 U.S. at 412,103 S.Ct. at 705. However, the court will not concern itself with whether the law is

wise or not as a matter of policy. *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 412, 54 S.Ct. 231, 243 (1983).

Purposes held to be legitimate under the Court's standard include shielding consumers from pass-through of increased utility taxes, *Exxon Corp. v.. Eagerton*, 462 U.S. 176,191,103 S.Ct. 2296, 2306, 76 L.Ed.2d 497 (1983); protecting consumers from escalating deregulated natural gas prices." *Energy Reserves Group*, 459 U.S. at 417,103 S.Ct. at 707; and protecting mortgage holders from foreclosures during the Depression, 290 U.S. 398, 54 S.Ct. 231.

Clearly, the goals of this statute are not as lofty as the consumer protection objectives involved in the above-mentioned precedents. Section 2860 was a product of the "napkin agreement" between special

interest groups.[17] Insurance groups and attorney groups, in order to resolve problems created by the *Cumis* decision, studied many alternatives to curtail defense costs,[18] and launched a massive legislative campaign through lobbying by the California Trial Lawyers Association and other insurance and tort reform groups.[19] The lobbying battle resulted in a truce with compromise legislation in the form of Senate Bill No. 241, which included the current Section 2860.

Section 2860 was not an exercise of the State's police power, but was promulgated

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17 The "napkin agreement," worked out in Frank Fat's Sacramento restaurant, is described in the *California Lawyer*, Jan/Feb 1988, pp. 24-25. (*See* Exhibit 1, Appendix D)

18 I.S.O., Commercial General Liability Insurance--Legal Defense Cost Containment (1985); Dorsch, *Insurance Defense Costs and the Legal Defense Cost Containment Program: Is the Free Ride Over?*, 53 Ins. Couns. J. 580 (1986).

19 Cox, *Accord Reached in Calif. Tort Reform*, Nat'l L.J., Sept. 28,1987, at 3, note 5; Cox, *Tort Reform Draws Fire at California Bar Meeting*, Nat'l L.J., Oct. 5,1987, at 8; Wiegand, *Battle of the Buyout*, A.B.A. J. California Edition, Sept. 1,1988 at CE-8.

solely to benefit special interests by decreasing insurance and litigation defense costs. Furthermore, the legislature has benefited these special interests through an unconstitutional means by modifying the rules of professional responsibility for attorneys relating to conflicts of interest -- an area in the exclusive control of the judiciary.[20] The substantial impairment caused by retroactive application of Calif. Civil Code Section 2860 is not justified by any substantial and legitimate public purpose.

Even assuming that a substantial and legitimate public purpose exists, such an enactment substantially impairing the obligation of contracts must be based "upon reasonable conditions and of a character appropriate to the public

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20 *See supra* note 15.

purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22, 97 S.Ct. at 1518; *Energy Reserves Group*, 459 U.S. at 412,103 S.Ct. at 705. The statute's severe, retroactive, and permanent nullification of Petitioner's contractual and ethical obligation to represent the insureds, and the insureds' right to unconflicted representation must be measured against "the public purpose justifying [the statute's] adoption" to determine the reasonableness of the legislation. *Ross*, 655 F.Supp. at 834.

Passage of Section 2860 and its retroactive application in this case is unreasonable because it was not the result of a legitimate and constitutional exercise of the State's police power, but was promulgated solely to benefit special interests and in the process has modified the rules of professional responsibility

for attorneys relating to conflicts of interest -- an area in the exclusive control of the judiciary.[21] Adoption of Section 2860 was never intended to directly benefit the public. In addition, its meddling with attorney-client conflict of interest issues forces insurance panel attorneys to work in conflict situations and deprives the insured of an unconflicted attorney. Such a law imposes unreasonable working conditions on attorneys and cannot be reasonably applied without injuring the attorney-client relationship -- a result not in the public interest.[22]

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21 *See supra* note 15, 17-19.

22 The decision by the California Court of Appeal, First Appellate District, Division 5, in applying California Civil Code Section 2860, raises serious issues regarding the ethical bounds of the attorney-client relationship and the extent to which the legislature and other outside parties can infringe upon that relationship. The decision places an unwarranted burden on an attorney who acts in good faith to fulfill his responsibilities pursuant to *Cumis*, and runs afoul of the intent of the case as well as the requirements of the Rules of Professional

As a result, retroactive application of California Civil Code Section 2860 by the California state courts unconstitutionally altered obligations of contract in violation of the Contracts Clause of the United States Constitution Article I,

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Conduct.

In this case, the Court of Appeal, in applying the statute, placed the burden on *Cumis* counsel (Petitioner) to demonstrate direct evidence of a conflict of interest in order to justify continued representation of the insured in a conflict situation. This requirement is antithetical to the goals of the Rules of Professional Conduct, especially Rule 3-310(C) which prohibits representation when there is either an actual or potential conflict. Applying Section 2860 in such a manner puts future counsel in the anomalous position of continuing potentially conflicted representation until the point where direct evidence of a conflict exists. At this point, counsel will have already provided representation to the insured while in a conflicted position. This is exactly the situation the Rules of Professional Conduct seek to avoid.

The inherent problem with the Appeal Court's approach is that it places counsel in the position of attempting to fulfill the ethical obligation of zealously representing both the insurer and the insured while remaining alert to compile direct evidence of a conflict of interest. Since the Rules of Professional Conduct contemplate that an attorney should not undertake representation when there is a potential conflict, the Appeals Court application of § 2860 places counsel in the untenable position of ignoring ethical obligations to the public's great detriment.

Section 10 and forced insureds to accept representation by conflicted attorneys.

2. Petitioner was denied due process of the law under the Fourteenth Amendment to the United States Constitution because the lower courts refused to allow introduction of Petitioner's relevant evidence demonstrating conflicts of interest by the insurance company's "panel" attorneys, as to which the court of appeal faulted Petitioner for not introducing adequate proof that the "panel" attorneys were in conflict with the insureds they were defending. Petitioner was also forbidden to introduce evidence of work done after the statute became effective.

The Fourteenth Amendment to the United States Constitution states that no "State shall deprive any person of life, liberty, or property, without due process of law." Despite its importance, due process has never been, and perhaps can never be, precisely defined. Unlike some legal rules, due process is not a technical concept with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. *Lassiter v. Department of Soc. Serv. of Durham Cty*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158 (1981). Specifically, the Court has recognized that "[t]he right to present evidence is ... essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S.

411, 429, 89 S.Ct. 1843, 1853 (1969); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797. If relevant evidence is erroneously excluded by the trial court, and then the party is faulted by the court for not providing that evidence, there can be no fundamental fairness in the court's orders, which bound his hands.

Generally, any legally competent evidence which, when taken alone or in connection with other evidence, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one of the parties, and sheds any light upon or touches the issue in such a way as to enable the jury to draw a logical and reasonable inference with respect to the matter or a principal fact in issue, is relevant. *Williams v. Vreeland*, 250 U.S. 295, 39 S.Ct. 438;

Chesbrough v. Woodworth, 244 U.S. 72, 37 S.Ct. 579.

A. The Ad Hoc Orders

Before trial, this case came up for a summary judgment hearing. At that hearing the judge entered certain orders regarding the applicability of California Civil Code Section 2860 to this case and forbidding your Petitioner from being paid after the statute's effective date.

During trial, the trial judge interpreted the pre-trial order to mean that not only were *none* of Petitioner's services after the cut-off compensable, but he could not even use them to show the work product he did before the January 1, 1988 cut-off, nor could he prove how work before the cut-off on related "retreatment" cases and the defenses in the dental malpractice cases advanced.[23]

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23 *See* C.T. 859 where Bradley and Curley ask about Hobson v W and express an interest in

Also, he forbade Petitioner's testimony about the problems in the dental malpractice cases and what he did in these cases to deal with the problems.

The trial court focused on the number of hours, and directed that Petitioner testify along an accounting line without permitting discussion of the problems in the dental malpractice cases. The trial court's idea is entirely time focused. *See* R.T. 866, lines 1 to 23:

> THE COURT: I will suggest, Mr. Caspari, to develop a line of questioning. I will leave it up to you.
> Start the question, "Mr. Berg, how many hours do you estimate you put in on the S case?"
> "I estimate I put in 100 hours, 200," whatever number
> "What do you think you spent that

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entering the re-treatment cases. Note the copy of this letter to TDIC. *And see* C.T. 785 to 788 where Bradley and Curley sent Berg a list of questions to ask during the Hobson v W depositions of Dr. Hobson to obtain his evaluation of all the dental malpractice cases out of the presence of lawyers for the malpractice plaintiffs. Dr. Hobson was set to be the expert of those plaintiffs against Dr. W. in the malpractice cases.

> time on?"
> "Well, ten hours on settlement, ten hours interviews, 15 hours research." Best he can do.
> *We are looking for hours. We are looking for time.* It doesn't help the jury for Mr. Berg to say, "Well, I had a lot of concerns about this case and I had to sympathize with Dr. S." Doesn't help. (Emphasis added.)
>
> THE COURT: Pose your question to Mr. Berg, "I know you are an intelligent person. *I know it is difficult because you say you didn't keep time records, good time records, but you have got to give estimates.*"
>
> *"I spent so many hours, I spent so many days,* I spent so many nights. *My best estimate is this is the time* I put in on this case." (Emphasis added.)
>
> THE COURT: That is *the only way* we can do it. (Emphasis added.)

This approach by the court prevented the Petitioner from demonstrating that he had been effective and productive -- that his work was significant or even, by implication, that he had done any work at all.[24] Despite objections which generally

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[24] TDIC's expert, Mr. Cooper, contested that Berg had not done any work (*See* R.T. 1374, line

were sustained Petitioner was able to introduce into evidence two examples of his work before the Section 2860, January 1, 1988 cut-off:

1. Controlling an Expert Against Dr. W

The expert witness against Dr. W was the man who bought Dr. W's practice, David Hobson, D.D.S. Hobson had sued Dr. W in a contract action seeking to be paid for redoing most of Dr. W's cases. Petitioner tried to explain how he used Hobson v W to build a defense in the dental malpractice cases. The court cut that subject off (R.T. 807, line 19 to 808, line 16).

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23), and TDIC's lawyer argued along that line in his jury speeches that the jurors use this case to send a message to lawyers. (*See* RT 1380-1382)

2. Obtaining an Expert for Dr. W

Petitioner began to testify about W. Gene Roberts, D.D.S., the Director of Bone Development at the University of the Pacific Dental School. Dr. Roberts became familiar with Dr. Hobson's criticisms of Dr. W in conjunction with the Hobson v W contract case. In the course of that case, Petitioner learned that that Dr. Roberts disagreed strongly with Dr. Hobson's evaluations of orthodonture cases in general[25] and Hobson's retreatment plans for Dr. W's cases in particular. Through the Hobson v W case, Petitioner was able to cultivate Dr. Roberts to become an expert to defend all the dental

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25 Dr. Roberts criticized indiscriminate use of the Tweed ideal. (C.T. 826) Hobson's retreatment proposals for Hispanic (rounded face) patients was to extract all four first bicuspids and retract the incisors and canines to flatten their profiles -- an activity which would require more orthodontic movement of the teeth than cultural aesthetics requires. Root resorbtion is a hazard of such movement. The anterior teeth lose some of their anchor in the jawbone and are in danger of being loosened or lost.

malpractice cases against Dr. W.

When the natural opportunity to show what Petitioner did to find and develop Dr. Roberts as an expert to defend Dr. W. in the dental malpractice cases, this colloquy ensued at R.T. 949, line 21 to R.T. 950, line 8 with the court intervening although Respondent's attorney had not objected:

> Q. Mr. Berg, why is that significant?
>
> A. What we are looking for is a theory of defense and W. Gene Roberts is the, I think, director at the University of Pacific Dental School, Director of Bone Development is what they call it. And what I am trying to do is see about an expert who will deal with the things that Hobson had been doing serially through all the cases that resulted in a concept that accused Dr. W. of malpractice for not having done. And Roberts turned out to be a fantastic witness on that theory because he just -- he had terrible criticisms of Hobson and what Hobson was doing. In fact, he accused Hobson --
>
> THE COURT: Let's not retry the

> underlying case. *Let's tell how much time you put in.* (Emphasis added.)

Many other examples of Petitioner's industry and acumen were kept out of evidence. In a discussion of patient x-rays Petitioner studied in preparing the malpractice cases the court interrupted *in the absence of an objection. See* R.T. 961, line 22-R.T. 962, line 3:

> BERG (testifying): Now, with orthodontia the roots of the tooth are very important. Every time you move teeth you may cause resorption of root, and you can see that in periapical x-rays.
>
> THE COURT: You are off into another area, Mr. Berg.
>
> THE WITNESS: I am trying to tell you the kinds of material I am looking at.
>
> THE COURT: You did the work, you did this thing. *We don't need the details.* I am sure it is interesting. (Emphasis added.)

Respondent's counsel did object, and Petitioner was again prevented from providing a full answer to a direct

examination question about the purpose for certain other work at R.T. 964, ln 24 to R.T. 965, ln 2:

> Q. It was some deposition you were reviewing with the purpose in mind of getting information for the Wieber case?
>
> A. Exactly. As I saw the cases together, I could see they were interdigitating and there was a way to, I thought, develop defense of the -
>
> MR. ROREM: Your Honor, objection. No question pending.
>
> THE COURT: You have answered the question. Next question.

At times the court became so focused on its hours/accountancy approach that it would not even let Petitioner answer questions about what he did to support particular entries on his bills:

> Q. Next item on the bill is $200,000 demand. Do you remember what that is about?
>
> A. That was a demand in the case. Most of these cases had gigantic demands. The total of the demands exceeded the policy or policies that could be covered.

> And then on top of that, there were re-treatment claims that further depleted --

MR. ROREM: Objection, irrelevant.

THE COURT: Objection, sustained.

Asked what he did at the early stage of Dr. P's litigation Petitioner was not permitted to answer. *See* R.T. 1007, lines 11 to 22:

> BY MR. CASPARI:
> Q. Mr. Berg, could you tell us what you did at the early stages -- what you did at the early stages of the P. litigation.
>
> A. In the early stages of the case, we had all of the work in the hands of one attorney, except for two cases. One was with Ed Zinman, who I know and talked with, trying to find out, you know, what his objectives were, where the thing was going, who might try the case.
> And the other was with Kalzamanski [Cal Zamanski, Esq] and Bradley & Curley wasn't getting along with [him].
>
> MR. ROREM: Objection, nonresponsive.
>
> THE COURT: Sustained. Also a narrative.

Rulings such as these left the jury with the impression that the instant case was only about counting hours and not about Petitioner's productivity based on his study of the case materials, his individual industry, and his useful activity.

In the course of his work as "independent counsel" Petitioner found specific documentation which would be useful to undercut his clients' adversaries. Petitioner intended to offer these facts into evidence at the trial to show his work. The court interjected (with no objection by plaintiff's attorney) and both diminished the impact of the evidence and drew the line against any more such evidence. *See* R.T. 1010, line 19 to 1011, line 23:

> Q. Could you describe for us generally what that approach was that you were looking at.

A. There were several threads that began to become apparent that could be defense methodologies.
One of the things that I was interested in was whether Dr. Hobson was the incorruptible pure soul he was relating himself to be as an expert witness, and one of the things that I found -- remember Mr. Cooper said you never look at insurance forms. Well, I look at everything.
We got the subsequent records of Dr. Hobson, including his insurance forms, and he -- not all of them were interesting, but there were two that I found that are very fascinating.

Q. What was fascinating about those forms, Mr. Berg?

A. First of all, it was double billing.

And second of all, if you take a look at them, they are identical bills to two different insurance companies by Dr. Hobson under two different policies.
If you put it up on the board, I will show you what I am talking about.

MR. CASPARI: We would like to have marked as Petitioner's next in order --

THE CLERK: Marked as Petitioner's Exhibit Q for identification.

THE COURT: *I will let you do it this one time.* Don't do it twice.

> We are not going to go into all the details of the underlying cases. (Emphasis added.)

Once the trial court had clearly made it impossible for Petitioner to show the nature or the value of the work which he performed, the jury's response to TDIC's argument was a foregone conclusion. TDIC's lawyer told the jury, "Petitioner did not show what he did." (*See* R.T. 1321, 1345, 1374, 1440, 1447 and 1449).

The role of Dr. Tanner's defense attorney in malpractice cases where Dr. P and Dr. Tanner were both charged came up at R.T. 1027, and again the court cut off Petitioner's description of his work (lines 5 to 14):

> Q. Who is Art Pearson?
>
> A. Art Pearson is another defense lawyer and we had a cross-complaint against Terry Tanner because Terry had been spoiling records and blaming [Dr. P.] for spoiling the records. Terry had been treating the patient and doing --

THE COURT: *Let's not try the case.* You called Defense Counsel? (Emphasis added.)

With regard to Dr. M the same pattern was followed. *See* R.T. 1035, lines 6 to 11:

A. Oliva didn't have the real bad problem Carlile had.

Q. You said it was a serious problem in Carlile. What was the serious problem?

MR. ROREM: Objection, irrelevant.

THE COURT: Objection, sustained.[26]

B. Plaintiff's Theory of the Case Allowed Petitioner's Evidence

Plaintiff's claims manager, Gabor Nyary, testified that *if Petitioner did the work he was entitled to be paid.* (*See* R.T. p. 275, lines 3 & 4)

Q. Mr. Berg would be entitled to be paid for that if he did that; is that

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[26] The Carlile problem was that Dr. M, a dentist, violated the Medical Practice Act by doing surgery on plaintiff's hip without a medical license. No insurance will cover acts in violation of law.

right?

A. If he did that.

The exact date of performance of work didn't matter if it was the date the papers were received or some other date. Mr Nyary further testified on page 275 at line 20 to 26:

> Q. My question is, if Mr. Berg puts on his time sheet -- I am sorry -- on his bill, "Pleading received, .03 hours, September 3rd" does it make any difference to TDIC if he does that work on September 3rd or September 7th. They are going to have to pay him the same amount, aren't they?
>
> A. The work is done, he is entitled to payment.[27]

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27 Mr. Nyary testified that if TDIC had questions about what the attorneys were doing plaintiff's procedure was to phone the attorney (R.T. 169, line 12 to 21). Mr. Nyary never discussed defendant's fees or his work with him (R.T. 249, line 24 to 250, line 3, 345 lines 4 to 15, R.T. 354, lines 1 to 7, R.T. 361, lines 15 to 16). Plaintiffs never sent Mr. Berg their billing guidelines, if they had any. (R.T. 362, line 18 to 363, line 9). The only contact plaintiff had with defendant about bills related to format. Mr. Walker talked to "some lady" in defendant's office (R.T. 1066, line 18) and asked to have the format of defendant's bills changed, which was done (R.T. 1065, line 7 to 1068, line 21).

At page 276 Mr. Nyary continued at lines 1-4:

> Q. So if he, in fact, did the work, he is entitled to be paid for it?
>
> A. If he did the work, he is entitled to payment.

C. The Trial Judge Forbade Admissible Evidence to Dispel the Fraud Charge

Petitioner's work with TDIC's panel counsel after the Section 2860, January 1, 1988 cut-off was squelched. (*See* R.T. 480, line 20 to R.T. 481, line 5.) The fact that Petitioner continued to work after the cut off was held to be irrelevant *even as to his state of mind* for intent to defraud. The subject came up in testimony of TDIC's Dorn Walker:

> BY MR. CASPARI:
> Q. Now, Mr. Walker, after Mr. Berg was advised in the W and P cases that he was no longer going to be paid by TDIC, are you aware that Mr. Berg continued to work on those cases?

MR. ROREM: Objection, irrelevant.

THE COURT: Mr. Caspari, what is the relevance if he knows that he was still working after the cutoff date?

MR. CASPARI: The relevance, Your Honor, is that -- actually it had to go to Mr. Berg's state of mind. If we could approach the bench. I do not think you want me to argue this.

THE COURT: No, I don't.
Objection, sustained.
(C.T. 1175, line 21 to 1176, line 5)

The court sealed that ruling with an erroneous jury instruction which absolutely cut off Petitioner's compensation after January 1, 1988 (C.T. 628 and 629, R.T. 1461, lines 13 to 16).

Petitioner was forbidden to introduce evidence of work done before the cut-off that came out in papers generated by him that are dated after January, 1988, and he was restricted in his efforts to discuss the work he had done prior to the cut-off. Those rulings supported Respondent's theory of the case as developed by

Respondent's expert, Brand Cooper, Esq. that Petitioner did *no work* therefore he should not have been paid. (*See* C.T. 727, lines 20 to 24.)

In the course of defending against these charges obviously Petitioner needed to provide the jury a basis to believe that his billing was honest, reasonable, not excessive, and related to productive work actually performed for the benefit of the cases. That defense was available through Petitioner's testimony about how his work differed from the work of the insurance panel counsel, what problems were encountered, how they were solved, and the relationship of his work to results actually obtained in the cases. Respondent put into issue all these questions and opened the door to Petitioner's exposition of the histories and progress of the cases.

The contract action of Hobson v W was primarily a massive dental malpractice suit by Hobson to make money doing retreatment of almost all of Dr. W's patients whose dental insurance money Dr. W had received before he sold the practice to Dr. Hobson.

The trial court allowed Respondent to disparage (through its expert Mr. Cooper) the allocations of time on that case which Petitioner testified he had attributed properly to the dental malpractice defenses. Mr. Cooper was critical of that characterization by Petitioner (R.T. 574, lines 5 to 13). It amounted to $27,062 (R.T. 585, line 25) which TDIC paid.

Cooper's testimony put into issue the very question on which Respondent had sought and obtained a pre-trial *in limine* order forbidding Petitioner from discussing the Hobson v W suit (motion *in*

limine, no. 1, C.T. 593-594). Respondent could hit Petitioner on this point, and did. Petitioner was forbidden to defend himself by providing a complete description with illustrations showing exactly how Hobson v W was properly used to defend the dental malpractice cases. Only specks of information were allowed into evidence such as the reference to Dr. Roberts (*See* pages 11 and 12 hereof) and the Tracy Richardson double billing (*see* page 16 hereof quoting the trial judge, "I'll let you do it this one time. Don't do it twice.") Petitioner was not allowed to show that Dr. Roberts accused Hobson of injuring two of the dental malpractice plaintiffs (C.T. 825) or that he could be helpful in the other cases (C.T. 826 to 827). Among other things Petitioner was forbidden to show that Hobson testified in a deposition Petitioner took that he would

personally benefit from stirring up dental malpractice suits against Dr. W (C.T. 698, line 31). Obviously those evidentiary rulings left Petitioner a sitting duck for Respondent's attacks.

D. Respondent Capitalized on the Court's Erroneous Evidence Rulings

Respondent's counsel made hay with those evidence restricting rulings to cast doubt that any work had been done by Petitioner before the cut-off. *See* his argument beginning at R.T. page 1321, lines 20 to 22:

> We got some very interesting bills up here and the interesting thing is Mr. Berg has shown us nothing, nothing to support those bills.

R.T. 1345 lines 4-7:

> ...where is he giving them the fruit of these hours, of pondering all of this? He showed almost nothing. He had absolutely nothing to show for the work that he did in P.

R.T. 1345 line 23 & 24:

> He didn't bring in his documents.

R.T. 1374 line 23:

> *There is no reason to believe that he did any work....*
> (Emphasis added.)

R.T. 1440 line 24 to 27:

> He was reading this deposition and this deposition and this, comparing it with that. The problem is, we don't know that he did that. What did he leave us?

R.T. 1447 line 13-22:

> I am pointing to the fact that the documents didn't come in here. The substantiating, corroborating proof. He said, "Well, Mr. Cooper said that he looked at the work product." That is right. Mr. Cooper looked at the work product and was dismayed and came to the conclusion he hadn't done anything. He looked at what they tried to find in the way of work product and found that he wasn't doing to anything, wasn't writing anything, wasn't doing anything.

And R.T. 1449 lines 1-7:

> Another problem that Mr. Cooper found that the work product. They said he looked at the work product. There was another problem. He couldn't connect it up. Whatever papers are there he couldn't connect up with work that Mr. Berg had done. There was no indication of work. There were papers, but on most of it, the so-called work product, was almost

non-existent.

This inflammatory argument was based on the court's refusal to allow Petitioner to discuss his work, show how it was useful, and produce into evidence documents dated after the cut-off which were based on work done by him before the effective date of §2860. An adverse verdict of fraud was inevitable because those rulings allowed Respondent's attorney to make false statements which he knew Petitioner couldn't impeach.[28] The argument ended with a pitch to the jury to make an example of Petitioner.

During closing argument *at the liability phase* of the instant trial, Respondent's counsel attempted, and apparently succeeded, in inflaming the jury to the point that a fair trial was

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28 A lengthy description of defendant's work is found at C.T. 689 to 711 which is supported by documents at Clerk's Transcript pages 716 to 1157.

not possible. Counsel urged the jury make an example of appellant because "There is no reason to believe that he did any work...." Counsel urged the jury to send a message to Petitioner to take to his fellow lawyers (R.T. 1382, line 7 to 13). He argued that the message should be a huge verdict, "[The] prime reason is Mr. Berg has been licensed . . . to be an attorney." (R.T. 1380, line 15 to 18) Even though the question at that stage was whether appellant had defrauded TDIC, and if so by what amount, counsel argued that appellant should be punished and made to give back every cent TDIC had paid him. (R.T. 1380, line 15) The argument was not for compensation, but to punish his alleged misconduct; "The administration of our legal system is what he has trashed." (R.T. 1381, lines 4 to 5) The jury, apparently swayed by counsel's rhetoric,

complied with his suggestion and returned a verdict against Petitioner. In the face of counsel's argument, "This was a dirty deal from the beginning," (R.T. 1382, lines 16 to 17) it was impossible for appellant to get a fair trial.

E. Admissible Evidence of Work to Support an Attorney's Bill

The reasonableness of a lawyer's fee is determined by evidence of many factors, including:

> "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age and his experience in the particular type of work demanded [citation]; *the intricacies and importance of the litigation*, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (emphasis added.)
>
> *In re Marriage of Cueva* (1978) 86 Cal.App. 3d 290, 296 [149 Cal.Rptr. 918]

In Cueva a divorce lawyer's fee was at issue on an appeal where "abuse of discretion" is the standard of review. The Court of Appeal evaluated the problems customary to settling community property disputes (at page 297). At page 299 the court discussed fees awarded by a divorce court judge based on the attorney; work as determined "from [the court's] own experience and from the facts and circumstances of the case...." relying on *Anthony v Anthony* (1968) 259 Cal.App. 2d 156, 66 Cal.Rptr. 420 continued:

> [P]laintiff hired attorney whose experience in accounting, corporate finance and community property law facilitated a thorough investigation of Anthony Pools, Inc. and Defendant's assets. Faced with the result of plaintiff's attorneys' investigation, but fearing management problems and financial disaster if Anthony Pools, Inc. stock was suddenly dumped on the market, Defendant refused to transfer any stock to plaintiff. Defendant's attorneys came up with the solution Defendant accepted: The property settlement agreement incorporated a

> trust composed of Anthony Pools stock; plaintiff got trust income and the power to invade corpus up to $30,000 annually. In substance, through skillful investigation and success in settlement negotiations, plaintiff's attorneys obtained for plaintiff, in addition to Defendant's offered $415,000 in property and $1,000 monthly, trust income worth $450,000, $500 monthly in child support and Defendant's promises to pay income taxes and to pay plaintiff's attorneys' fees known to be substantial. In the light of plaintiff's attorneys' efforts and success we cannot say the trial court abused its discretion.

In *Stokus v Marsh* (1990) 217 Cal.App. 3d 647, 658, 266 Cal.Rptr. 90, 96, the trial court made this assessment which the Court of Appeals quoted:

> Plaintiff's counsel were met at every step with learned, energetic, imaginative, concentrated, and extensive opposition by extremely able counsel who specialize in housing matters. Petitioners appear to be able to put up the stoutest resistance, which they did.

From the foregoing it is clear that the attorney has the right to evidence which describes his work, discusses the problems, demonstrates his quest for

solutions, evaluates the opposition counsel and witnesses, and in every other way provides adjective materials upon which a jury can make an intelligent assessment of his knowledge, grasp of the case, ingenious solutions, and other exercises of diligence, skill and acumen to illustrate the fact that he did the work for which he was engaged.

The trial court's limitation on such evidence and its insistence on hours only is clearly erroneous and devastatingly unfair contrary to the fundamental fairness required by the due process clause of the 14th Amendment and resulting in an obvious miscarriage of justice.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue for the above stated reasons.

Because this Petition deals with the Constitutional application of California Civil Code § 2860, 28 U.S.C. § 2403(b) may be applicable; therefore, the Attorney General of the State of California shall also be served with this Petition.

Respectfully Submitted,

2/16/94

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APPENDIX A

1. U.S. CONSTITUTION CONTRACTS CLAUSE
2. CALIFORNIA CIVIL CODE §2860

UNITED STATES CONSTITUTION

ARTICLE I, SECTION 10:

"No state shall ... pass any ... law impairing the obligation of contracts...."

EXHIBIT 1

Title 13.5

OBLIGATION TO DEFEND ACTION

Section

2860. Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information.

2861 to 2866. Repealed.

Title 13.5 was added by Stats.1987, c. 1498, § 4.

§ 2860. Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information

EXHIBIT 2

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of

that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the

independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged

materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract. (Added by Stats.1987, c. 1498, § 4. Amended by Stats.1988, c. 1114, § 1.)

APPENDIX B

1. CALIFORNIA COURT OF APPEAL OPINION
2. JUDGMENT ON VERDICT FROM TRIAL COURT
3. ORDER GRANTING SUMMARY JUDGMENT
4. PETITION FOR REHEARING IN CALIFORNIA COURT OF APPEAL
5. PETITION TO CALIFORNIA SUPREME COURT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE DENTISTS INSURANCE COMPANY, Plaintiff and Respondent,	A057488
v.	San Francisco Super. Ct. No.
JEROME BERG, Defendant and Appellant.	896838
_____/	DECISION

Jerome Berg appeals from a judgment awarding damages to The Dentists Insurance Company (TDIC). He contends the trial court erred in granting summary adjudication of certain issues, in making various in limine and evidentiary rulings, and in denying his motion for a new trial based on a claim of excessive damages.

EXHIBIT 1

In September 1988, TDIC filed a complaint against Berg alleging causes of action for fraud and deceit, negligent misrepresentation, breach of oral contract, breach of the covenant of good faith and fair dealing, restitution, and money had and received. The gravamen of the complaint was that in reliance on fraudulent bills, TDIC had overpaid Berg some $250,000 for services allegedly performed as independent counsel in dental malpractice actions against four of its insureds (San Diego Federal Credit Union v Cumis Ins Society Inc, (1984) 162 Cal.App.3d 358). Berg cross-complained alleging, among other things, that on the contrary, TDIC owed him $162,000.

TDIC moved for summary adjudication (Code Civ. Proc., § 437c) of two issues presented by the cross-complaint: (1) that following enactment of Civil Code section

2860 (added by Stats. 1987, ch. 1498, § 4, p. 5779)[1] TDIC was not obliged to pay for Berg's services as Cumis counsel for Drs. P., W. and M. (the insureds) because it had reserved its right to deny coverage solely because of punitive damages allegations, and (2) that it had no obligation to pay for Berg's services in the case of Oliva v. M. (Oliva) wherein it had not reserved the right to deny coverage at all. The trial court granted the motion as to both issues.

TDIC then moved in limine to exclude evidence concerning, among other things, cases in which Berg defended Drs. W. and

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1 Civil Code section 2860, effective January 1, 1988, codified the holding of San Diego Federal Credit Union v Cumis Ins Society Inc, supra, 162 Cal.App.3d 358, that where a conflict of interest arises between insurer and insured, the latter has a right to independent counsel paid for by the former. Subdivision (b) specifies, "No conflict of interest shall be deemed to exist as to allegations of punitive damages ...."
[Footnote 2 next page.]

P. In contract actions brought by the purchasers of their practices; retreatment claims against Drs. W. and P. which did not result in malpractice actions: and amounts allegedly due for services performed after January 1988 in malpractice actions against Dr. W. After a hearing, the trial court partially granted the motions.[2]

After a 12-day trial, a jury found in favor of TDIC, assessing $282,024.86 in compensatory damages. In answer to three special interrogatories, the jury found by clear and convincing evidence that Berg had acted with oppression, malice and fraud. The trial court rendered judgment against Berg in the amount of $322,960.02, including costs.

On March 20, 1992, Berg filed a

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[2] The details of these rulings will be addressed in part II of this opinion, concerning Berg's challenge thereto.

motion for judgment notwithstanding the verdict or a new trial (Code Civ. Proc., § 657). After a hearing, the trial court denied the motion.

I.

Berg's primary contention is that the trial court erred in granting summary adjudication of issues.

A.

As to the first issue, Berg points out that Civil Code section 2860 cannot be applied retroactively (Center Foundation v. Chicago Ins. Co. (1991) 227 Cal.App.3d 547, 557-558). Here, of course, it was applied prospectively when TDIC notified the insureds in January and February 1988 that it would no longer pay for Cumis counsel. Nor was TDIC's action an unconstitutional impairment of contract rights (Lyon v. Flournoy (1969) 271 Cal.App.2d 774, 779). The right to Cumis

counsel is dependent upon the existence of a conflict of interest. Under section 2860, subdivision (b), allegations of punitive damages do not suffice to create such a conflict.

Berg also maintains that having advised the dentists of a conflict necessitating independent counsel, TDIC is estopped from discontinuing payment to him. The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended;

(3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (Strong v. County of Santa Cruz (1975) 15 Cal.3d 720, 725, citation omitted.)

In this case, as soon as TDIC became aware that punitive damages allegations did not require it to provide Cumis counsel, it so informed Berg and his affected clients. The cases on which Berg relies are distinguishable.

In Bogard v. Employers Casualty Co. (1985) 164 Cal.App.3d 602, counsel retained by the insurer informed the insured on four separate occasions that he did not represent their interests and advised them to retain independent counsel in settlement negotiations, which they did, incurring attorney fees. (Id. at p. 607, fn. 2.) Although the court ultimately determined there was no conflict of

interest, it held the insurer to the consequences of its erroneous determination. (Id. at pp. 609-611.) Unlike TDIC, the insurer in Bogard "acted under the misapprehension that a conflict existed" (id. at p. 611), effectively abandoning its insured at a crucial stage o~ the litigation (id. at p. 614).

In United Pacific Ins. Co. v. Hall (1988) 199 Cal.App.3d 551, 553, the court held "that Cumis counsel retained in a civil action for damages was not entitled to payment from the insurer for his representation of insured parents in a proceeding brought against their son pursuant to Welfare and Institutions Code section 602," because the latter was not an action seeking damages within the coverage of their homeowner's policy. (United Pacific Ins. Co, supra, at p. 556.) In dicta, the court rejected the

insurer's invitation to base its holding on the insurer's "tardy discovery" that its reservation of rights applied only to the son and thus it had no conflict with and no obligation to provide Cumis counsel for the parents. The court reasoned that the insurer knew or should have known it was reserving rights only as to the son before it urged Cumis counsel to assume full control of the litigation. (Id. at p. 555.)[3]

Finally, Berg contends there were conflicts of interest between TDIC and the dentists which survived the passage of Civil Code section 2860 and required TDIC to continue providing independent counsel

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3 Contrary to Berg's assertion, Cumis counsel was not "the second lawyer defending the Halls in the juvenile case." He was "associated" only in the damage action (United Pacific Ins. Co. v. Hall, supra, 199 Cal.App.3d at pp. 554, 555). TDIC, on the other hand, continued to provide the dentists with representation by its counsel, Bradley and Curley.

(United States Fidelity & Guaranty Co. v. Superior Court (1938) 204 Cal.App.3d 1513, 1525). "A conflict of interest between jointly represented clients exists 'whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other.'" (Foremost Ins. Co. v. Wilks (1988) 206 Cal.App.3d 251, 260, citation omitted.) In the insurance contest, such a conflict is likely to arise where coverage under the policy is disputed, or where the claim against the insured is likely to result in a recovery in excess of the policy limits unless the insurer accepts a settlement offer within the policy limits. (Ibid.) "The problem when the attorney knows, or should know, that a conflict has appeared between the insurer and the insured as to the most beneficial course of action indicated by

the developing circumstances. Purdy v. Pacific Automobile Ins. Co. (1984) 157 Cal.App.3d 59, 76.)

Berg first claims he introduced evidence that the insureds were all charged with misconduct for which TDIC was not liable under Insurance Code section 533, which provides, "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." The problem is that Berg has not shown that he introduced any such evidence.

He did not raise the issue in his motion for summary adjudication. In its letters informing the insureds of their entitlement to Cumis counsel (despite one reference to Ins. Code § 533), TDIC reserved its rights expressly and exclusively as to punitive damages. By

contrast, its letter to Dr. S. advises him of an amended complaint stating a cause of action for spoliation of evidence and explicitly reserves the right to deny coverage as to both punitive and compensatory damages for intentional acts. Although Berg occasionally seems to have forgotten, Dr. S.'s case was settled in 1987, and the challenged summary adjudication ruling named only the other three dentists.

Nor does Berg's appellate briefing of the issue reveal where in the record we might find the facts on which his entire argument relies. In his opening brief he merely states that "the dentists were charged with wilful misconduct," and that he "introduced evidence that Dr. W, Dr. P and Dr. M were all charged with intentional misconduct."

In his reply brief Berg asserts the

complaints against Drs. P. and W. "inherently involved wilful acts" even under a strict interpretation of Insurance Code section 533. He refers to "meat factory" claims based on a theory that Dr. P. deliberately provided substandard services for economic gain. He says Dr. W. was "charged with spoliation of evidence," a necessarily wilful act. He states Drs. M. and W. "were charged with conduct that could have been construed as a wilful act as a matter of law because their alleged conduct [practicing medicine without a license, permitting unlicensed personnel to provide dental services] was intentional and violated a fundamental and substantial public policy."

None of these statements is accompanied by a citation to the record.

Berg's statement of facts sheds no further light. There he says Dr. W. was

charged with permitting unlicensed employees to practice dentistry and doctoring charts to conceal his tortious acts. Dr. P, he claims, was charged with "running a 'meat factory' to maximize his profits," as well as with "destroying x-rays, altering charts and doing dental work while intoxicated." Dr. P. was also accused, according to Berg, of "deliberately doing hasty, slipshod dental work." Finally, allegations of intentional wrongdoing were "central" to the suits against Dr. M. who was allegedly charged with performing surgery on a patient's thigh without a medical license and fraudulently representing himself as an M.D.

Some of these statements, like those in the argument portion of Berg's briefs, omit record references altogether. What references there are to the clerk's

transcript are not to documents before the trial court hearing the motion for summary adjudication of issues, but to selected pages of a 438-page appendix of exhibits which Berg filed with his declaration in support of his new trial motion and invited the trial court to "brows[e] through."[4] The material Berg cites in support of his characterizations of the charges against the dentists is not direct evidence of those charges. Rather, it appears to be selected pages from largely unidentifiable, unattributed, unauthenticated documents obtained during discovery.

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4 TDIC objected below to Berg's appendix of exhibits and renews its objection on appeal, citing Pulver v. Avco Financial Services (1986) 182 Cal.App.3d 622, 632 ("As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.]"). Berg has not replied to this objection. The trial court hearing the new trial motion "did not read [the exhibits] in depth," but "looked at them and tried to pick out pertinent parts of them."

Thus Berg's contention that there was a conflict of interest between TDIC and the dentists because plaintiffs in the underlying actions alleged intentional misconduct must fail for lack of evidence of its most basic premise, i.e., the existence of such allegations. On the record before us, we cannot decide whether any such allegations rose to the level of a "wilful act" within the meaning of Insurance Code section 533. It follows that we need not address the issue of whether TDIC would have been estopped to deny coverage for any such "wilful act" by its failure to reserve rights as to compensatory damages.

Next Berg posits a conflict of interests based on allegedly different settlement postures between TDIC and its insured dentists (San Diego Federal Credit Union v. Cumis Ins. Society, Inc., supra,

162 Cal.App.3d at p. 366). He states that "TDIC wanted to settle the ... cases, presumably to minimize its costs," whereas Drs. P. and W, "were opposed to any settlement that wo ld trigger reporting requirements of Business and Professions Code §§ 801 and 802." The portion of the reporter's transcript cited in support of this assertion consists of testimony by TDIC attorney Curley regarding his firm's determination to obtain a settlement under the $30,000 reporting limit rather than going to trial and risking a larger judgment which might cost Dr. P. his license! Citations to the clerk's transcript include one to Berg's declaration in support of his new trial motion and several to the attached exhibits which, as explained ante in footnote 4 and accompanying text, are not relevant to Berg's challenge to the trial

court's earlier summary adjudication of issues.[5]

Berg suggests there was a conflict of interest because Drs. P. and W. should have filed cross-complaints against the purchasers of their practices (Tanner and Hobson) who were also insured by TDIC. He did not raise this point in opposition to the summary adjudication motion. The record shows Berg filed a cross-complaint against Hobson prepared by TDIC's attorneys who asked Berg not to serve it "at this time as discovery is continuing." Berg's assertion that the attorneys' "hesitancy was caused by [their] dual representation" is pure speculation.

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5 It is nonetheless interesting to note an internal memorandum in which claims representative Janette M. Osborne reports that she and Curley, having convinced Dr. P. to "settle for a reasonable figure," then bullied the plaintiff into reducing his $75,000 demand to $29,999, after which, Dr. P. "became very emotional, even shedding tears." In Osborne's opinion, she had made "a friend for life" of Dr. P.

Berg claims a similar conflict on the grounds that TDIC itself was a potential cross-defendant in the malpractice cases. His theory seems to be that TDIC reneged on its agents' representations that it would pay for retreatment of patients allegedly mistreated by Drs. W. and P., causing Tanner and Hobson to encourage said patients to file malpractice claims. Most of the evidence cited in support of this theory is found in the aforementioned appendix of exhibits which was not before the trial court hearing the summary adjudication motion. Berg states without explanation that TDIC was liable under his theory for breach of the covenant of good faith and fair dealing and/or of its fiduciary duties. He has not shown that if such liability existed, the only or even the best way to proceed was by cross-complaint in the malpractice actions. He

himself evidently did not do so, nor has he shown that TDIC's attorneys failed to advise the dentists "of all facts necessary to make fully informed decisions concerning the lawsuit," as he alleges. In fact, in his reply brief, he argues that his own decision not to file cross-complaints was irrelevant because he came to the same conclusion as TDIC's attorneys free of any unconscious desire to reconcile conflicting interests."

Berg has not shown any conflict of interest requiring TDIC to continue furnishing Cumis counsel after the passage of Civil Code section 2860.

B.

As to the second issue summarily adjudicated, Berg contends that regardless of any reservation of rights in the case of Oliva v. M., TDIC was required by Insurance Code section 533 to deny

coverage for the wilfull acts complained of. As explained ante in part A; he has not cited any evidence properly before us to demonstrate the existence of any such allegations.

Berg further asserts TDIC was estopped to deny him payment for the Oliva case because at his request its attorneys sent him the Oliva file. It can hardly be said, although Berg manages to say it, that TDIC thus induced Berg to work on the case under the misapprehension that TDIC would pay him. Rather, by requesting files for both Carlile and Oliva in the same letter, Berg induced TDIC's attorneys to believe he had a right to both files.

In sum, the trial court did not err in granting summary adjudication of issues.

II.

Berg maintains that various trial

court rulings prevented him from showing that despite his anomalous billing procedure, he had done the work for which he had been paid. The point is not well taken either in general or in particular.

A.

First, Berg contends he was not permitted to introduce evidence about his work in the underlying malpractice cases. The seven excerpts he has selected from 12 volumes of reporter's transcript to illustrate his point do not do so.

He quotes, for example, part of a colloquy in which, outside the jury's presence, the trial court tried to help Berg's attorney develop a line of questioning which would elicit the number of hours he worked on the underlying malpractice cases. With great solitude, the trial court, expressly supported by Berg's attorney, pointed out that the

amount of time spent was the key to the amount of remuneration TDIC owed him, and that his tendency to wander, to drift, to "tell stories" as Berg put it, would not help the jury decide this issue. The 18 pages of testimony immediately preceding the recess, in which Berg's attorney tried mightily to get him to describe a typical working day in September 1987, offer ample evidence of the need for and appropriateness of the trial court's gentle guidance. Moreover, contrary to Berg's contention, he was asked several times to describe what he had done in a specific case.

The next excerpt is one in which, after the trial court sustained TDIC's objection, before his attorney could rephrase the question, Berg volunteered that certain testimony was "very significant." His attorney then asked an

enabling question. After 12 lines of testimony, the trial court interrupted: "Let's not retry the underlying case. Let's tell how much time you put in," to which Berg replied, "okay."

In yet another instance cited by Berg, he interrupted his own attorney to testify for more than a page, with no question pending, about dental technicalities, before the trial court ventured, "You are off into another area, Mr. Berg. ... We don't need the details." In fact, however, Berg repeatedly testified at length about the details of his participation in the underlying malpractice litigation, curtailed only by his own counsel.

Berg next mischaracterizes the trial court's sustaining a relevance objection to testimony about retreatment claims in accordance with an in limine ruling as a

refusal to let him answer questions about entries on his bills. Equally unwarranted is his calling the trial court's sustaining a "no question pending" objection a refusal to let him testify about his thought processes. While he contends the court prevented him from testifying about what he did in the early stages of Dr. P.'s cases, in reality it merely suggested counsel ask questions, as narrative testimony "with this witness might take a little while."

Finally, Berg objects to the trial court's permitting him to testify about what he had done because "it telegraphed to the jury that whatever followed was irrelevant!" What actually happened was that the trial court allowed testimony of the details of underlying cases over a sustainable relevancy objection with the admonition, "I will let you do it this one

time. Don't do it twice."

Berg has not shown one instance in which he was improperly denied the opportunity to introduce evidence about his work in the underlying cases. On the contrary, his own selected excerpts from the trial transcript, read in context, reveal the trial court's patience and leniency with an often difficult witness.

B.

Next, Berg maintains the trial court improperly excluded evidence of work he did after January 1988. He argues that notwithstanding the Civil Code section 2860 ruling (ante, part I A.), the evidence was relevant to prove his state of mind on the issues of fraud, oppression and malice. But he has not shown the trial court excluded such evidence.

His general assertion that the trial court interpreted the earlier ruling to

preclude all evidence of services rendered after January 1988 finds no support in the minutes of the hearing on in limine motions at the cited pages of the clerk's transcript. The only example of the trial court's allegedly "overbroad rulings" in this regard is offered without citation to the recorder's transcript. Since we have found the trial court properly granted TDIC's summary adjudication motions, the jury instruction embodying the Civil Code section 2860 ruling was also proper.

C.

TDIC moved in limine to exclude evidence about Hobson v. w., in which Berg defended Dr. W. in a suit by the purchaser of his practice. The trial court limited such evidence to relevant background testimony "within reason." Berg testified he had billed TDIC for time spent by an associate on the contract case "to the

extent it was appropriate." He explained how he thought the cases were related. Over an objection, the trial court admitted testimony about his strategy of using the contract case as a "discovery vehicle" for the malpractice cases. Berg has not shown the court "consistently" -- or ever -- prevented him from testifying about relevant facts of Hobson v W.

D.

TDIC moved in limine to exclude evidence of retreatment claims against Drs. W, and P. which did not lead to malpractice actions. The trial court limited such testimony to relevant background evidence which could be handled in a relatively simple manner "without bringing in a lot of collateral matters, without retrying other lawsuits." Berg contends evidence of his review of the retreatment claims was relevant to his

state of mind regarding the fraud claim. His claim the trial court excluded such evidence is apparently based on one ruling sustaining an objection after Berg's lawyer failed to demonstrate relevance.

E.

Berg claims the trial court ruled he could not testify about conflicts between TDIC and its insured, which were relevant to his state of mind because they were the basis upon which he believed he was entitled to be paid after the passage of Civil Code section 2860. In the single instance he cites to support this contention, the court sustained a relevance objection; Berg did not interpose his state-of-mind theory.

F.

Finally, Berg claims the trial court imposed an excessive sanction ~or his failure to produce itemized bills for

services rendered in the Dr. W. malpractice suits after January 1988. It is true that TDIC moved to preclude claims for this money under Code of Civil Procedure section 2023, subdivision (b)(3) (sanctions for discovery abuse). The record makes clear, however, that the trial court granted the motion on the basis of the earlier ruling that after the January 1988 effective date of Civil Code section 2860, Berg was not entitled to any payment at all as Cumis counsel.

III.

Berg's final contention is that TDIC was awarded excessive damages. "It must be remembered that the jury fixed these damages, and that the trial judge denied a motion for new trial, one ground of which was excessiveness of the award. These determinations are entitled to great weight. The amount of damages is a fact

question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial." (Seffert v. Los Angeles Transit Lines (1961) 56 Cal.2d 498, 506.) "[T]he trial court is in a far better position than the appellate court to determine whether a damage award is excessive since the trial court is vested with the power, denied to appellate courts, to weigh and resolve issues of credibility." (Hyatt v. Sierra Boat Co. (1978) 79 Cal.App.3d 325, 346, citation omitted.) "As a result, all presumptions are in favor of the decision of the trial court. (Seffert v. Los Angeles Transit Lines, supra, 56 Cal.2d at p. 507, citation omitted.) "An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush,

it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (Ibid.)

"To say that a verdict has been influenced by passion or prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." (Hyatt v. Sierra Boat Co., supra, 79 Cal.App.3d at p. 347, citation omitted.) "The conflicting evidence rule does not permit weighing of the evidence or reversal of a judgment in accordance with the preponderance thereof. A judgment against the weight of the evidence will be affirmed, absent prejudicial error, if there is substantial evidence in support of it. [¶] Further, the testimony of a single witness ... may be sufficient." (Chodos v. Insurance Co. of North America (1981) 126 Cal.App.3d 86, 97, citations omitted.) It was undisputed that TDIC had

paid Berg $357,024.86. After two days' deliberation, the jury awarded compensatory damages in the amount of $248,024.86, but no punitive damages. As the trial court noted, the general verdict does not reveal how the jury arrived at this amount.[6]

Berg testified he used a "pleadings received" system, billing TDIC based on the number of pages in documents he received from its attorneys multiplied by three, the number of minutes per page he calculated would be necessary to review the documents at a later date. He had destroyed relevant time sheets. TDIC claims manager Gabor Nyary conducted a two-month review of Berg's billings, concluding Berg had defrauded TDIC "to the tune of about $250,000."

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6 Thus Berg's argument that he was entitled to be paid for services rendered on the Hobson case (see p. 17 ante) is of no avail.

Litigation management expert, M. Brand Cooper, testified as to how attorneys generally keep track of time spent and bill their clients. At TDIC's request, Cooper had reviewed Berg's billings in this case. After describing that process and the reports it generated, Cooper testified that in his opinion Berg's billings were "unreasonable, excessive, dishonest and don't bear any relationship to the work that was actually expended ...." For reasons which he described in detail, he concluded that "the overwhelming majority of the descriptions on the bills represent descriptions of work that was not performed. Finally, he testified that appropriate compensation for the work Berg did as Cumis counsel was between $10,000 and $50,000.

Berg's challenge to the verdict is

based in large part on factual assertions without reference to the record, objections not raised below to the admission of Cooper's testimony and the bases of his opinions, and citations to conflicting evidence. He argues primarily that the jury should have believed him rather than the experts.

Substantial evidence supports the jury's verdict: it does not suggest passion, prejudice or corruption.

The judgment is affirmed.

July 30, 1993

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King. J.

We concur:

_____

Peterson, P.J.

_____

Haning, J.

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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE DENTISTS INSURANCE COMPANY No.896838

Plaintiff, JUDGMENT ON

vs. VERDICT

JEROME BERG,

Defendants.

_____/

This action came on regularly for trial on October 29, 1991, Mark Rorem

EXHIBIT 2

appeared as attorney for plaintiff The Dentists Insurance Company and William Caspari appeared as attorney for defendant Jerome Berg.

A jury of twelve persons was regularly empanelled and Sworn to try the action. Witnesses for both plaintiff and defendant were sworn and examined. After hearing the evidence, arguments of attorneys, and instructions of the Court, the jury members retired to consider their verdict, and subsequently returned into court, and, being called, answered to their names and rendered their verdict in writing and words and figures as follows: on the complaint brought in this action by The Dentists Insurance Company, the jury found for The Dentists Insurance Company and against Jerome Berg and assessed damages of $282,024.86.

On the cross-complaint of Jerome Berg

against The Dentists Insurance Company, the jury found for The Dentists Insurance Company.

The jury was requested to answer three special interrogatories and answered them as follows:

1. Do you find by clear and convincing evidence that Jerome Berg acted with oppression? Answer: Yes.

2. Do you find by clear and convincing evidence that Jerome Berg acted with malice? Answer: Yes.

3. Do you find by clear and convincing evidence that Jerome Berg acted with fraud? Answer: Yes.

On plaintiff's request for punitive damages, the jury assessed no punitive damages in favor of The Dentists Insurance Company and against Jerome Berg.

It is adjudged that plaintiff The Dentists Insurance Company recover the sum

of $282,024.86 and costs in the amount of $40,935.16 from defendant Jerome Berg, for a total judgment of $322,960.02.

Dated: February 19th, 1992

_____

EDWARD STERN

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER NINE

THE DENTISTS INSURANCE COMPANY Plaintiff, vs. JEROME BERG, AND DOES I THROUGH XV, INCLUSIVE Defendants.	No.896838 ORDER RE MOTION FOR SUMMARY ADJUDICATION OF ISSUES

AND RELATED

CROSS-ACTION

The motion by Cross-Defendant The Dentists Insurance Company for Summary adjudication of Issues, heretofore submitted, is decided as follows

EXHIBIT 3

Issue One is GRANTED.

Issue Two is GRANTED.

DATED: February 1, 1991

Ira A. Brown, Jr.

Judge of the Superior Court

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER NINE

THE DENTISTS	No.896838
INSURANCE COMPANY	CERTIFICATE OF
Plaintiff,	SERVICE BY MAIL
vs.	(CCP 1013a(3))
JEROME BERG, AND DOES	
I THROUGH XV, INCLUSIVE	
Defendants.	

AND RELATED

CROSS-ACTION

I, BENITA A. LEE, Deputy County Clerk and Deputy Clerk of the Superior Court of the City and County of San Francisco certify that I am not a party to the within action; that I served a copy of the

attached

ORDER RE MOTION FOR SUMMARY ADJUDICATION OF ISSUES

by placing said copy in an envelope addressed to the following:

Ellyn Freed
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which envelope was then sealed and postage fully prepaid thereon, and was on FEBRUARY 6, 1991 deposited in the United States mail at San Francisco, California.

DATED: FEBRUARY 6, 1991

PILLSBURY, MADISON & SUTRO

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Cross-Defendant, The Dentists

Insurance Company

Superior Court of the State of California

City and County of San Francisco

THE DENTISTS	No. 896838
INSURANCE COMPANY,	REVISED
Plaintiff,	[PROPOSED] ORDER
vs.	GRANTING THE
JEROME BERG,	DENTISTS

and DOES I	INSURANCE
through XV,	COMPANY'S MOTION
inclusive,	FOR SUMMARY
Defendants.	ADJUDICATION OF
_____	ISSUES
JEROME BERG,	Date: November
and DOES 1	7, 1990
through XV,	Time: 9:30 A.M.
inclusive.	Dept: 9
Cross-Complainants,	Trial: January
vs.	7, 1991
THE DENTISTS	
INSURANCE COMPANY,	
Cross-Defendant.	

Plaintiff and cross-defendant The Dentists Insurance Company's ("TDIC") motion for summary adjudication of issues in connection with the first cause of action of Jerome Berg's ("Berg") cross-complaint and TDIC's fifth affirmative

defense came on for hearing in Department 9 of the above-entitled Court on November 7, 1990. Pillsbury, Madison & Sutro appeared on behalf of TDIC and the Law Offices of Walter S. Moeller appeared for defendant and cross-complainant Berg. Based on that motion, the papers filed in connection with that motion, the records and files in this action, the argument presented and for good cause shown, the Court finds that there is no triable issue of fact.

IT IS ORDERED that TDIC's motion for summary adjudication of issues is granted and that:

1. TDIC had no obligation following enactment of Civil Code section 2860 to pay Jerome Berg's statements for services allegedly performed and costs allegedly incurred as independent counsel for TDIC's insureds Todd G. Plum ("Plum"), Stan C.

Wolken ("Wolken") and Peter G. Mozsary ("Mozsary") in cases where TDIC reserved its rights solely because of allegations of punitive damages. Therefore, on the first cause of action of his cross-complaint, Berg cannot recover from TDIC for any services allegedly performed and costs allegedly incurred after January 18, 1988, in connection with his representation of Plum and of Wolken, and after February 19, 1988, in connection with his representation of Mozsary in Carlile v. Mozsary, Solano County Superior Court Action No. V 10606.

2. TDIC had no obligation to pay Jerome Berg's statements for services allegedly performed and costs allegedly incurred as independent counsel for TDIC insured Mozsary in Oliva v. Mozsary, an action wherein TDIC did not reserve any rights as to its insured. Therefore, on the first

cause of action of his cross-complaint, Berg cannot recover from TDIC for services allegedly performed and costs allegedly incurred in connection with his representation of Mozsary in Oliva v. Mozsary, Solano County Superior Court Action No. 85432.

The Court FURTHER ORDERS that these adjudicated issues be carried forward into the final judgment entered in this action.

Dated: , 1990.

_____

Judge of the Superior Court

B-50

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION: 5

DENTISTS INSURANCE COMPANY

vs.

BERG, JEROME

A0574-88

San Francisco County No. 896838

BY THE COURT:

The petition for rehearing is denied.

Filed Aug 23, 1993

Dated: _____

_____P.J.

EXHIBIT 4

B-51

First Appellate District, Division Five,

No. A057488

S035069

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE DOCTORS' INSURANCE COMPANY,

Respondent

v.

JEROME BERG,

Appellant

Appellant's petition for review DENIED.

Filed in the Supreme Court November 23, 1993.

ARABIAN

Acting Chief Justice

EXHIBIT 5

APPENDIX C

1. EXCERPT FROM MEMO OF POINTS AND AUTHORITIES IN SUPPORT OF JNOV
2. EXCERPT FROM PETITION TO CALIFORNIA COURT OF APPEAL
3. EXCERPT FROM PETITION FOR REHEARING TO CALIFORNIA COURT OF APPEAL
4. EXCERPT FROM MEMO OF POINTS AND AUTHORITIES OPPOSING SUMMARY JUDGMENT
5. EXCERPT FROM PETITION TO CALIFORNIA SUPREME COURT

C-1

(EXCERPT FROM C.T. 1160)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

THE DENTISTS	No.896838
INSURANCE COMPANY	**DATE: To Be**
Plaintiff,	**Announced**
vs.	**TIME: To Be**
JEROME BERG, AND DOES	**Announced**
I THROUGH XV, INCLUSIVE	**DEPT. To Be**
Defendants.	**Announced**
_____	**Before The**
AND RELATED	**Honorable**
CROSS-ACTION	**Gerald**
_____/	**Regan**

EXHIBIT 1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE,FOR JUDGEMENT N.O.V.

(EXCERPT FROM C.T. 1183)

intent that §2860 operate retroactively. In examining the legislative intent, the Center Foundation court found the legislative intent to have been the opposite. Id. Moreover, the court found that § 2860 was "not the sort of statute that applies retroactively." Id.

In fact, such an interpretation would be unconstitutional under the United States Constitution, Article I, Section 10. The Cumis rule was not judicial fiat. It was designed to protect contractual rights found in the insured's coverage, as these rights are affected by potential liability to a third party. See McGee v.

Superior Court (1985) 176 Cal.App.3d 221, 226 [221 Cal.Rptr. 421]; San Diego Navy Federal Credit Union v. Cumis Insurance Society (1984) 162 Cal. App.3d 358, 364-65 [208 Cal.Rptr. 494]. The existing law is read into contracts in order to fix their obligations. The Constitution does not allow the State Legislature to impair those rights that private parties justly and reasonably expected under the contract. Lyon v. Flourney (1969) 271 Cal.App.2d 774 [76 Cal.Rptr. 869].

Thus, there was no way that §2860 could have provided a basis for TDIC to escape from its obligation to provide the dentists with independent counsel.

iii) Even If § 2860 Could Be Interpreted To Excuse TDIC Providing Independent Counsel, TDIC Was Estopped From Stopping Payment To

Independent Counsel

Even if §2860 somehow applied to TDIC's obligation to pay Berg, under circumstances of the dental malpractice cases,TDIC was estopped from discontinuing payments. TDIC could not, after it had agreed to provide and had provided independent

C-5

San Francisco Superior Court No. 896838

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA FIRST APPELLATE DISTRICT

DIVISION FIVE

JEROME BERG

Appellant

vs.

THE DENTISTS INSURANCE COMPANY

Respondent.

APPELLANT'S OPENING BRIEF

On Appeal From The Order Of The Superior Court

Of The County of San Francisco

Honorable Gerald Regan, Judge

EXHIBIT 2

(EXCERPTS FROM PAGES 17 AND 26)

(PAGE 17)

not preclude judicial determination of conflict of interest and duty to provide independent counsel as long as the determination is consistent with §2860. *Id.*

Based on these authorities TDIC had to establish that there was no ground on which any one of the insureds was entitled to independent counsel. Instead, TDIC established only that under §2860 the punitive damage allegations did not obligate TDIC to pay for independent counsel for Dr. P, Dr. W or Dr. M. The proof ignored all other bases for the obligation. TDIC, therefore, failed to establish a sufficient basis for summary judgment. Its motion should have been denied.

4. Section 2860 Had No Retroactive Effect And, Therefore, Had No Effect On TDIC's Duty To Pay Berg

Even if the punitive damage allegations were the only conflict between TDIC and its insureds, passage of §2860 did not retroactively excuse TDIC from paying for independent counsel. Section 2860 is not retroactive. *Center Foundation v. Chicago Insurance Company* (1991) 227 Cal.App.3d 547, 558 [278 Cal.Rptr. 13, 20]. TDIC's obligations to the dentists in the forty-five cases had been fixed long before passage of §2860. TDIC could not unilaterally stop paying Berg.

Such an interpretation would be unconstitutional under the United States Constitution, Article, I, Section 10. The *Cumis* rule is not judicial fiat. That provision protects the insureds' contractual rights. See *McGee v. Superior*

Court (1985) 176 Cal.App.3d 221 [221 Cal.Rptr. 421]. The existing law is read into contracts to fix the parties' obligations. Under the Constitution, a state legislature may not impair rights that parties justly and reasonably expect under existing contracts. *Lyon v. Flourney* (1969) 271 Cal.App.2d 774 [76 Cal.Rptr. 869]. Section 2860, therefore, could not have provided a basis for TDIC to escape its continuing obligation to pay Berg's fees.

- (PAGE 26)

detriment. *Security Environmental Systems Inc. v. South Coast Air Quality Management District (1991)* 229 Cal.App.3d [280 Cal.Rptr. 108] reh. den.

This case comes within equitable estoppel. Here Berg requested the Oliva file in August 1987. (C.T. 250) (Ex. 11). Berg requested the file because he was

representing Dr. M on the punitive damage claims. (Ex. 11). After advising TDIC that they intended to send the file, (Ex. C) B&C sent the file to Berg without raising any objection. (Ex D). Berg began to work on the case.

Through this chain of events, TDIC had induced Berg to work on the cases under the misapprehension that TDIC would pay him. TDIC should have been estopped from denying its responsibility to pay for the situation it created.

9. The Trial Court's Decision To Grant Summary Adjudication Made It Impossible For Berg To Get A Fair Trial

The judgment below should be reversed because the errors which are the subject of this appeal resulted in substantial prejudice to Berg. Pursuant to California

Code of Civil Procedure §475, a judgment should not be reversed unless the error caused substantial injury to the appealing party.

In this case, there is little doubt that the error was the cause of substantial prejudice. The trial court's errors infected both of the major issues at trial -- the number of hours that Berg permissibly spent working on the cases and his state of mind regarding the basis of the dispute.

The number of hours that Berg worked is the central dispute. If the trial court had ruled properly then Berg would have been entitled to prove that he was entitled to be paid for the time that he spent working on the cases after January 1988, in Hobson v. W and on

C-11

Civil No. A057488

San Francisco Superior Court No. 896838

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

JEROME BERG,

Appellant

v.

THE DENTISTS INSURANCE COMPANY

Respondent.

PETITION FOR REHEARING
(RULE 27 OF CALIF. RULES OF COURT)

On Appeal From The Order Of The Superior

Court Of The County Of San Francisco

Honorable Gerald Regan, Judge

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EXHIBIT 3

(EXCERPT FROM PAGES 16-17)

VIII. ERRORS BY THE TRIAL JUDGE

As the trial got underway Judge Regan asked for a thumbnail review of the Summary Adjudication (R.T. 30, lines 25 to 26). Mr. Rorem recited enactment of § 2860 and TDIC's cut-off letter concluding that there had been a Summary Adjudication "that TDIC did not have an obligation to pay Mr. Berg for work he performed after the January 18, 1988 notice...under Civil Code § 2860...." (R.T. 31, lines 5 to 8) The trial judge ruled, "... I will respect [the Summary Adjudication] decision in this. In fact I think by law -- I am not sure I can change it." (R.T. 31, lines 11 to 13) There followed a discussion on whether an interim ruling can be reversed and the trial judge said he was "not planning to overrule" that decision. (R.T. 32, lines 7 to 10)

Defendant's theory of the case was that his clients had been charged with willful acts which insurance does not cover, and that TDIC's lawyers could control the evidence to tip the cases into non-coverage (see Opening Statement, R.T. 70 line 25 to 72, line 17).

At R.T. 288† (lines 8 to 27) the trial judge indicated that Berg's work after 1988 was not to come into evidence and that as to "coverage issues"* he sustained an objection that those issues were "totally irrelevant" (lines 25 to 27).

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(EXCERPT FROM C.T. 185)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

THE DENTISTS INSURANCE COMPANY

Plaintiff,

vs.

JEROME BERG, AND DOES I THROUGH XV, INCLUSIVE

Defendants.

_____

AND RELATED CROSS-ACTION

_____/

No.896838

Date: September 11, 1990

Time: 9:30 a.m.

Dept: Nine (9)

Trial Date: January 7, 1991

CROSS-COMPLAINANT JEROME BERG'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO

EXHIBIT 4

CROSS-DEFENDANT THE DENTISTS INSURANCE COMPANY'S MOTION FOR SUMMARY ADJUDICATION

Cross-complainant Jerome Berg ("Berg") submits the following memorandum of points and authorities in opposition to cross defendant The Dentists Insurance Company's ("TDIC's") motion for summary adjudication:

A. INTRODUCTION

This case concerns the amount of legal fees which attorney Jerome Berg earned while representing four dentists as independent Cumis counsel in more than forty dental malpractice cases. Each of the dentists was a TDIC insured. TDIC recognized that it had a conflict of interest in connection with those cases and engaged Berg to be independent Cumis counsel.

(EXCERPT FROM C.T. 187)

affected defense of the dental malpractice

cases. TDIC actually generated the dental malpractice lawsuits. Therefore, from the point of view of the dentists, TDIC itself should have been a defendant in the dental malpractice cases. Under the authorities cited by TDIC itself, this constituted a conflict of interest which requires independent counsel. Second, TDIC had different settlement goals than the dentists. Thus, TDIC was obligated to provide independent counsel regardless of the purported conflcit over punitive damages.

TDIC's position is also based on legally incorrect grounds. TDIC conveniently ignores that it had already agreed to pay Berg to be Cumis counsel. Nothing in Civil Code §2860 suggests that the section was to be retroactively applied or that TDIC could change position, mid-litigation, at considerable prejudice to both its insureds

and to the attorney who had been protecting their interests. In fact the law is that TDIC was estopped to withdraw independent counsel.

TDIC also argues that it does not owe any money to Berg in connection with Oliva v. Mozsary because it never reserved any rights concerning that case. Under the circumstances of this case, TDIC is estopped to claim that there was no duty to provide independent counsel.

Berg does not contest that he was fully paid for his representation as independent counsel for Alfred Segura.

C. STATEMENT OF FACTS

The vast majority of the underlying dental malpractice cases arose when Dr. Stanley Wolken sold his dental practice to Dr. David Hobson and Dr. Todd Plum sold his dental practice to Dr.

C-18

Civil No. A057488
San Francisco Superior Court No. 896838

BEFORE THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JEROME BERG,

Appellant / Petitioner

v.

THE DENTISTS INSURANCE COMPANY

Respondent.

PETITION FOR REVIEW
OF A DECISION OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE

(SEEKING REVIEW OF CIVIL CODE § 2860 WHICH HAS NEVER BEEN INTERPRETED BY THE CALIFORNIA SUPREME COURT)

Appeal From A Judgment Of The Superior Court,

City and County Of San Francisco

Honorable Gerald Regan, Judge Of The Superior Court

EXHIBIT 5

(EXCERPT FROM PAGES 8-13)

Discovery of B&C's secret reports to TDIC revealed that B&C were supplying TDIC heavy evidence of willful torts by the TDIC insureds* -- stuff that "coverage counsel" Bronson, Bronson & McKinnon had been consulted about (C.T. 762). These secret reports were cited to the Court of Appeal (which down played the reports because they were not "direct evidence," Opinion page 9).

III. WHAT IS THE CONFLICT THRESHOLD?

A. The Court of Appeal Required "Direct Evidence" of Willful Acts

The Court of Appeal held that to be entitled to "independent counsel" under § 2860 an insured has to provide "direct evidence" from which the court can "decide whether any *allegations* rose to the level

of 'willful act' within the meaning of Insurance Code § 533." (Opinion, page 9. Emphasis added.) That Court found petitioner's showing (including typical pages of "allegations" from the very pages of the complaints) did not cross the threshold. Evidently court papers filed by attorneys for malpractice plaintiffs do not meet the unspecified requirements for "allegations." This ruling conflicts with a long line of cases that rely on the plaintiff's court-filed complaints to provide preliminary definition of the nature of the claim and the right to counsel.

In Maxon v Security Insurance Company (1963) 214 Cal.App.2d 603, 29 Cal.Rptr. 586 the court stated (214 Cal.App.2d pp. 616-619, 29 Cal.Rptr. pp. 593-594):

> The general rule is that the obligation to defend is measured by comparing the terms of the insurance

policy with the pleadings of the claimants who sued the insured

citing a long string of California cases. Obviously this obligation must be determined before the claim has been resolved. Remmer v Glens Falls, etc. (1956) 140 Cal.App.2d 84, 90, 295 P.2d 19, 22

The record before the Court of Appeal is filled with a variety documents which establish conflicts. Berg demonstrated before trial* that his dentist clients, Dr. W, and Dr. P, were charged with fact-specific demurrer-proof (C.T. 954†) complaints which graphically express acts of intentional wrong-doing. (C.T. 503† and 511†) At trial TDIC's panel counsel and Berg testified about the changes of intentional acts. (See Exhibit C hereto for a few juicy pages of that testimony.) In support of his motion for new trial, Berg filed a 26 page declaration in which

he made 272 specific page references outlining the conflicts (C.T. 687-712) as exhibited by a collection of 438 pages of secret reports to TDIC from B&C as well as other ugly documentary evidence obtained in discovery from the TDIC files** which show that TDIC and B&C were building dossiers for TDIC which would support refusal to pay indemnity under the compulsion of Insurance Code § 533 and related statutes. (Those documents appear at C.T. 716-1157). Berg's detailed declaration (C.T. 687-712) explained the significance of that evidence of willful acts on the conflict of interest issue as to each dentist.

Berg's theory of the case was that his clients had been charged with willful acts which insurance does not cover, and that TDIC's lawyers (B&C) were able to control the evidence to tip the cases into non-

coverage (see Opening Statement, R.T. 70 line 25 to 72, line 17).

If Berg's clients faced such conflicts, Berg had the right to prove his work for them as independent counsel after January 18, 1988 and to be paid for all his work on these cases for the years 1988 through 1990. If he could get paid for those 2 1/2 years of work, at a minimum he would not owe damages (or would not owe as much as the verdict) due to set-off, and at best he would be entitled to collect on his cross-complaint for the unpaid work during 1988, 1989 and 1990. TDIC's Claims Manager testified Berg could be entitled to be paid if he did the work regardless of billing on the wrong date (see R.T. 275 to 276†).

B. No Precedent for the "Direct Evidence" Test

The Court of Appeal's "direct evidence" burden of proof to show conflicts is contrary to existing law. The American Bar Association Code 5-15 standard* focuses on a lawyer's representation of "potentially" conflicting clients and those with "differing interests." This ethical threshold differs substantially from the new unpublished "direct evidence" test. Published California precedent also employs a different standard:

> "the problem arises when the attorney knows *or should know* that a conflict has appeared . . . ."
> Purdy v. Pac. Auto Ins. Co. (1984) 157 Cal.App.3d 59, 76, 203 Cal.Rptr. 524, 534. (Emphasis added.)

> The insurer's obligation to defend is not dependent on the facts contained in the complaint alone; the insurer must furnish a defense when it learns of facts from *any* source that create the potential of liability under its policy.

CNA Casualty of Calif. v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598, 606, 222 Cal.Rptr. 276, 279 (Emphasis added.)

Berg cited to the Court of Appeal explicit references to the Clerk's Transcript collection of letters and reports discovered in TDIC's files that prove TDIC learned from some source that the insured dentists had been accused of willful misconduct. The CNA Casualty test was met. The Court of Appeal's new test requires Berg to prove "direct evidence of the charge." Since circumstantial evidence is as probative as direct evidence (*See* BAJI 2.00) should the First Appellate District's new rule limited to "direct evidence" become the California uniform rule? If so, how high do you have to pile the stuff? Berg produced 438 pages out of TDIC's files including letters and reports from B&C to TDIC, copies of court-filed pleadings by the plaintiff lawyers, and

pages from depositions (C.T. 716-1157) which is carefully described with 272 page references in Berg's declaration. (C.T. 687-712)

IV. HOW MUCH EVIDENCE OF CONFLICT IS NEEDED?

TDIC's own records which were before the Court in the Clerk's Transcript contain mountains of indirect evidence that the charges of willful misconduct were made and a memorable chunk of direct evidence that they were communicated to TDIC by their investigators, claims agents, or attorneys.

Berg cited proof which the Court of Appeal acknowledged* that TDIC's files contained these secret reports from B&C and other documents that although not "direct evidence" of the willful act allegations obviously show that the cases

had the seeds of outcomes for which there would be no insurance indemnification, and defense counsel could "tip" the cases.

Especially note this evidence produced at the Motion to Reconsider the Summary Adjudication:

1. Mr. Cavalli's standard complaint (here from Hunter v W) charges at C.T. 503† that Dr. W "permitted people in his office (employees) to perform dental and orthodontic work on plaintiff when they were not licensed . . . to do so;" and

2. Mr. Rosenberg's standard complaint (here from Pasion v P) for which TDIC was notified that the trial court overruled demurrers, charges at C.T. 511† that Dr. P:

> advised his staff to refrain from providing . . . (him) feedback (that he) was not removing decay and treating infection

and that he

> . . . instructed (his) assistants . . . to erase and conceal from their records their notes and indicates (sic) of such . . . evidence of decay and infection. Said instructions constitute concealment, constriction, misrepresentation and spoilation of evidence . . . fraud . . . [those acts were] not committed against this plaintiff alone . . . [but were] a course of conduct of conscious disregard for the rights and safety [of patients]
>
> (C.T. 512†)

In the points and authorities in support of Berg's Motion to Reconsider Summary Adjudication, he argued at C.T. 543 that these statements from the actual "pleadings of the claimants who sued the insured" shows that TDIC cannot be "excused . . . from [its] duty to pay for *Cumis* counsel in the malpractice cases after January 1, 1988 [when § 2860 became effective]" because the right to independent counsel emerges from the recognized conflict (at C.T. 545) "arising

from the allegations that Drs. W and P had committed intentional acts (C.T. 549 Emphasis added.). TDIC was in conflict with its insureds over covered versus non-covered claims not over punitive damage claims" (citing the then-new case of J.C. Penney, etc v M.K. (1991) 52 Cal.App.3d 1009, 278 Cal.Rptr. 64) and pointing out that Insurance Code § 533 excludes intentional acts from indemnification.

V. EXISTING DECISIONAL LAW SUGGESTS THAT § 2860 MAY CONDONE A LOWER ETHICAL STANDARD THAN THIS COURT CAN TOLERATE TODAY AS THE ULTIMATE ARBITRATOR OF LEGAL ETHICS OF CALIFORNIA LAWYERS IN A TIME OF GREAT PUBLIC DISTRUST

This Court is the ultimate arbitrator of ethical conduct of California lawyers, and in that connection it has condemned

conflicts. Brydonjack v State Bar (1928) 208 Cal. 439 [281 P. 1018], Barton v. State Bar (1930) 209 Cal. 677 [289 P. 818], Brotsky v State Bar (1962) 57 Cal. 2d 287 [19 Cal.Rptr. 153], Ramirez v State Bar (1980) 28 Cal.3d 402 [169 Cal.Rptr. 206]

However, published decisions chip away at the ethical bright line forbidding conflicts. Two cases are disturbing in the present age of public disrespect for the justice system.

Almost 30 years ago this Court considered the ethical dilemma which arises when a lawyer is selected by the insurance company to defend the insured in circumstances where the lawyer's activities can control whether the outcome of a case will be covered by the insurance policy or not be protected by insurance. Gray v Zurich Ins. Co. (1966) 65 Cal. 2d

263 [54 Cal.Rptr. 104]. Counsel for Zurich sought an order that the insurance company was not obligated to defend Gray. Zurich claimed if forced to defend it had a conflict with Gray. Its defense (based on self-interest) would emphasize the willful conduct of the insured hoping to enhance the prospect that the outcome would be a verdict of intentional tort for which there is no insurance. (See 278-279, 54 Cal.Rptr. 113-114.) This Court ordered Zurich to defend and expressed a pious hope that despite the lawyer's candid expression of the conflicts dilemma, the attorney would resolve his conflicts to favor the insured against his employer (the insurance company). (See 278 n.18, 54 Cal.Rptr. at 114.) This view was adopted in Employers Ins. v Seeno Const'n Co. (N.D. Cal. 1988) 692 F.Supp 1150, 1160 n. 14. B&C's secret reports to

TDIC which support non-coverage under Insurance Code § 533 show that they were mired in conflict because they were serving their master TDIC's non-coverage objectives with every step of their defense of the insured dentists.

---

* The power of B&C to "tip" the cases out of coverage.

* Summarized at opinion page 8 and detailed at pages 6-7 hereof.

* See Motion to Reconsider Summary Adjudication, especially the copies of complaints filed by attorneys for malpractice plaintiffs of which CT 503† and 511† are the heart. Those two pages recite serious willful acts allegedly committed by defendant dentists. For convenience those pages are in Exhibit B hereto.

** See C.T. 700† and 701† for typical pages of Berg's declaration. Note the abundance of his page references to the documents as he describes the conflict of interest history. In addition, he suggested a browse of the adjacent pages. The Court of Appeal should have credited Berg's specific C.T. 272 references when it commented about the invitation to browse at page 8 of the opinion.

* Cited in San Diego Fed. Credit Union v. Cumis Ins. Society (1984) 162 Cal.App.3d 358, 208 Cal.Rptr. 491, at page 366, Cal.Rptr. 500

* The Opinion at pages 7 and 8 outlines the allegations listed at pages 6 and 7 hereof, but erroneously at page 7 says, "None of these statements is accompanied by a citation to the record." Berg's Opening Brief at pages 4 to 7 contains 61 C.T. and R.T. references including the "meat factory" citation (C.T. 1044† at the bottom of page 6 of that Opening Brief).

APPENDIX D

1. ARTICLE FROM THE CALIFORNIA LAWYER
2. JURY INSTRUCTION FROM TRIAL

CAPITOL INSIDER

A New Way to Pass Laws

Clay Jackson remembers well the night the deal was made last September Like the other participants in negotiations over tort reform legislation, Jackson, a lawyer and an insurance industry lobbyist, had retired to Frank Fat's restaurant in Sacramento after the talks broke down. Both negotiating teams were there, seated at different tables.

At another restaurant a couple of miles away was Assembly Speaker Willie Brown (D-San Francisco). "It was. suggested to the Speaker that he come down [to Frank Fat's] and assist in facilitating the negotiations," says Jackson. "He arrived about 10:30." A few minutes later Senate Judiciary Committee Chair Bill Lockyer (D-Hayward) also showed up, and the two

EXHIBIT 1

legislators conducted shuttle diplomacy between the tables.

"Eventually, we got most of the people together in a little area that connects the corner booth and the end of the bar." Jackson recalls. "We blocked the aisle for about 45 minutes." Some progress was being made, so Brown moved the meeting to a private room upstairs. In the wee hours of the morning, the deal was reached. A package of legislation affecting tort reform issues such as punitive damages and attorneys' fees would be passed in exchange for a moratorium on new legislation and ballot initiatives introduced by the parties involved in the negotiations. The deal was memorialized on a Frank Fat's cocktail napkin, witnessed by some of Sacramento's most powerful individuals and sealed with the Krazy Glue of their personal honor.

The next day the legislation was introduced as SB 241, sponsored by Lockyer and Brown, and by midnight it had passed. But the truce that was supposed to follow never materialized.

By the time 1988 flipped up on the political calendars, the deal was history, tossed out like any other cocktail napkin, as petitions for tort reform and insurance reform ballot measures began circulating all over and the parties to the moved to defend themselves. All that remains is the legislation - and the precedent for a new and, some say, dangerous process for passing laws.

Not that there is anything new about legislators and lobbyists negotiating deals in Sacramento watering holes. That is standard operating procedure "People who expect historic adversaries to negotiate in public are kidding

themselves," says Special Assistant Attorney General Michael Strumwasser.

But the meeting at Frank Fat's seems have taken a step beyond negotiation to a kind of private law-making involving neither the public nor their elected representatives. The lobbyists did not just block tort reform legislation as they had been doing for years; they passed law's.

"The abuse that took place in SB 241 was that there were no legislative hearings," says Strumwasser, who represented the attorney general's office in other negotiations over tort reform legislation. "It was all rushed through in the last minute on the assumption that if the special interests are satisfied, then the the public must be satisfied."

Assemblyman Byron Sher (D-Palo Alto) was unwilling to make that assumption, and

so was one of three legislators to vote against SB 241. Sher accepts that lobbyists will negotiate proposed legislation, but he believes legislators have to examine the back-room deals carefully.

Jackson defends the legislation and the process that produced it. "The criticism comes from people who don't understand how government works," he says. "Government in a democracy is always a function of special interests. You can complain that this group is more powerful than that group, but I don't know how you change that."

Jackson believes the special interests are merely bringing their expertise and their concern to the service of the general welfare The question is do the people have a clear idea of what they want?" says Jackson. "The answer is

no.Power in California rests first with the people, then in the Capitol building." Agreeing that there has been another swing in the pendulum of power, Jackson says that "power is flowing back out to the people" as represented by the special interests.

Jackson declares that to be a positive development. Given the Legislature's inability to take any meaningful action on either tort reform or insurance reform in recent years, he argues that the special interests have proven themselves more representative of the general public's interests than the legislators. And now that their truce has come apart at the seams, perhaps the special interests have also proven themselves just as ineffective as the Legislature.

GEORGE HARTWELL, *California Lawyer*

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(C.T. 627)

PROPOSED JURY INSTRUCTION

NO. 21 (Sp.1.01)

NO OBLIGATION FOR PAYMENT BY PLAINTIFF WHERE IT RESERVED ITS RIGHTS DUE TO PUNITIVE DAMAGE ALLEGATIONS

The Court has determined, and it is the law of this case, that plaintiff had no obligation following enactment of Civil Code Section 2860 to pay defendant's statements for services allegedly performed and costs allegedly incurred as independent counsel for its insureds Todd G. Plum, Stan C. Wolken and Peter G. Mozsary where it reserved its rights solely because of allegations of punitive damages.

Authorities: Order granting plaintiff's motion for summary adjudication heard November 3, 1990.

EXHIBIT 2

GRANTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

_____

JUDGE OF THE SUPERIOR COURT